

15. May 1738. 3. 6

AN
ABRIDGMENT
OF THE
First Part
OF MY

L^d. Coke's Institutes;

Some ADDITIONS explaining
many of the difficult CASES, and
shewing in what POINTS the LAW
has been altered by late Resolutions and
Acts of Parliament.

By WILLIAM HAWKINS Serjeant at Law.

The Fourth Edition. To which is now added,
a large Index in the Nature of an Analysis
of the most General Heads.

In the SAVOY:

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THE PREFACE.

THE Authors whom I have attempted to abridge have ever been universally admired: The one, for his great Perspicuity, and uncontested Authority; the other, for his infinite Variety of curious and useful Learning: So that I cannot doubt but my Endeavours would be in some measure acceptable, if I could any Way contribute to the better remembring, or easier understanding, of what all who study our Laws desire to be perfect Masters

It has been a great Discouragement to the Study of the Law, that these Authors, which are generally recommended to be first read, are in many Parts so very difficult, that it is

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scarce

scarce possible to understand them, without a previous Knowledge of those common Grounds which great Men are apt to think beneath the Dignity of their Writings to take Notice of. This I fear has caused many to forsake their Studies with an Aversion to the Law it self, and a misconceiv'd Opinion, that generally it is not to be reconciled with the natural Notions of Right and Wrong; and that most of its Distinctions consist rather in the empty Chicanery of Words, than in any real Difference in the Nature of Things. I have therefore, for the greater Ease of Beginners, endeavour'd to explain many of those Cases which usually appear most intricate at first Reading; and tho' I am sensible that many of my Explications will seem trifling and obvious to those who have made any Progress in their Studies, yet if they may any Way prove useful to them for whose Benefit alone they were design'd, I hope they will not be condemned as wholly unserviceable to the Publick.

Many

The P R E F A C E.

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Many also have been discouraged from laying the Foundation of their Studies in these excellent Books, because great Part of them is not Law at this Day; and they cannot easily perswade themselves to read so much abstruse and obsolete Learning, with that Attention which is necessary to the perfect Understanding of it. But whoever considers how great a Coherence there is between the several Parts of the Law, and how much the Reason of one Case opens and depends upon that of another, will, I presume, be far from thinking any of the old Learning useless, which will so much conduce to the perfect Understanding of the Modern. I could by no means therefore think it proper to leave out any Point of Law, merely for its being disused; but that young Students may know what is now in Use, I have shew'd in what Cases the Law has been alter'd by Parliament, or my Lord Coke has been contradicted by Modern Resolutions.

I have

I have taken Care to have all my own Additions printed in a particular Character; so that I hope I shall not be censured for having blended them with what depends on the Authority of these incomparable Authors, since no one can be in Danger of being led into any Mistake thereby.

A N

A N
A B R I D G M E N T
O F

The First Part of my Lord COKE's
Institutes.

Of FEE-SIMPLE.

Tenant in Fee-simple is he, who hath Lands or Tenements to hold to him and his Heirs for ever.

The word *Tenere*, from which Tenant is derived, sometimes signifies to have the Estate of the Land, as non *Tenet* pleaded by the Tenant to a *Præcipe*, signifies that he has not the Freehold of the Land in Question: Sometimes it signifies to hold Land by some Service: Sometimes it signifies to be bound, as *Teneri & firmiter obligari* in a Bond, &c.

Feodum idem est quod hæreditas, and signifies that Land belongs to a Man and his Heirs. Sometimes Land, as holden of a Lord by some Service, is call'd his Fee; as when Tenant in Avowry pleads *extra feodum*, &c. this signifies that the Land is not holden of the Avowant, but none can plead this, unless

Of Fee-simple.

less he takes the Tenancy upon him, for *the* is unreasonable, that the Lord's Title to *faul* the Seigniorie should be disputed by one who *half* has nothing to do with the Tenancy. *Me*

Simplex idem est quod Legitimum vel Pu rum, therefore a Fee conditional, or quali- *K.* fied, are not properly Fees-simple. *Con*

Hereditaments are either Real, as Land *heri* and Tenements; or Personal, as Annuity *Ann* or mix'd, as Dignity of Earl, &c. of such *main* Place. *O*

Some can take a Fee only for the Benefit *with* of others, as an (a) Infidel or Alien, who *mad* cannot hold any Freehold, and if they make *Heir* such Purchase, the K. on Office found shall *Age* have it. If they die, the Law casts the *No* Estate on him without Office, for the Free- *cover* hold cannot be in Abeyance; nor can an Alien *so it* take a Lease T. of Land, but if he be a Mer- *waive* chant *Al* any, he may take Lease T. of a House *Cove* for his Habitation, for he cannot carry on his *his S* Merchandise without it; but if he dies *of th* he leaves the Realm, K. shall have it: If *refer* he makes him a Denizen, he may purchase *A v* and his Issue born after his Denization shall *land,* inherit; if he dies without such, the Land *but th* shall escheat to the Lord. *nor, t*

The Purchase of one attainted of Treason *perfec* or Felony goes to the King; the Purchase *witho* of one guilty of Felony, and afterwards *Wh* attainted, shall escheat to the Lord *in his* for in the first Case the Purchaser was dead *Capac* in Law when he purchas'd, not so in the other *by the*

If any Corporation civil or religious purchase *Way l* Land without Licence, by the Statute *neigh* of Mortmain the next Lord may enter with *bus.*

Of Fee-simple.

2

the first Year after the Purchase, in his Default the next *Mesue* Lord within the next half Year may enter, and so shall all the *Mesues* in their Turns; in Default of all, *K.* shall have it for ever. By a favourable Construction, *K.* shall presently seize Inheritances, which lie not in Tenure. An Annuity, because it is Personal, is not Mortmain.

One when at full Age may perfect, or without Cause alledged, waive a Purchase made by him within Age, so may his Heir, if he dies without agreeing at full Age.

Non compos making a Purchase, and recovering his Memory, can't waive it; agree to it he may, if he doth not, his Heir may waive it.

Abbot purchasing without Consent of his Covent, cannot waive it at all; nor can his Successor, unless it was to the Prejudice of the Church, as if too great Rent were reserved, &c.

A Wife can take no Estate from her Husband, but she may take from a Stranger, but the Husband may divest it; if he doth not, the Wife after his Death may waive or perfect it, so may her Heir, if she die without doing either.

Whoever takes a Fee, must either take it in his natural Capacity, or in a politick Capacity; therefore, tho' anciently a Grant by the Lord to his Commoners, that their way leading to their Waste should not be heightened, or a Grant to a Lord, & homi-

bus suis tam liberis quam natis, or Purchase

Of Fee-simple.

(s) Keil.
42.

Chafe of Land by Parishioners or Inhabitants, or Church-wardens, or *probi homines de Dale*, were holden to be good; yet the Law is otherwise now. But Church-wardens and Parishioners may purchase Good for they are a special (a) Corporation for this Purpose.

Wife of J. S. Earl of P. Dean of D. &c. may take by such Name, and the Purchase will be good, tho' the Christian Name be mistaken, for there can be no Doubt who is meant by such Name, & *utile per inutile vitatur*: But in Pleading, the proper Name must be shewn. Nor is it safe in Pleading to translate Surnames, as to call one name *Williamson filius Willi*, for tho' our Christian Names were for the most Part known to the Romans, and we know how they would be called one of such a Name in Latin, it is otherwise of Surnames. Name of Confirmation different from that of Baptism, ought to be used. *Primogenitus filius, omnes liberi & heredes J. S.* are good Names of Purchase.

No Limitation whatsoever to a Bastard before he is born can give him an Estate tho' the Words are to the next Issue of J. begotten of J. N. Legitimate or Illegitimate. So that tho' he afterwards becomes Bastard Eigne, yet is he not helped.

But a Bastard having gained a Name & Reputation, may purchase by it, and other lawful Subjects, tho' Ideots, Lepers &c. except Monsters, and Men of Religion professed of some Order. An Hermaphrodite may purchase according to the Sex that prevails.

Of Fee-simple.

5

The Grant of an Office by King or Subject, concerning the Administration, Proceeding or Execution of Justice, or King's Revenue to one unskilful, is void, for the Publick is injured by it. Nor is a judicial Office grantable in Reversion, *for tho' the Grantee be never so fit at the Time of the Grant, he may become unfit when it takes effect.* Nor can the Stewardship of a Manor be granted to an Infant.

K. may be said to be seized of an Office (tho' he can't be an Officer) in respect of his Power to grant it to another.

By 27 *El.* 4. A Purchaser for good Consideration shall avoid all former fraudulent Conveyances. One having a good Lease for sixty Years, forged one for ninety Years, and sold the forged Lease, and all his Interest in the Land to *J. S.* this is no Purchase of the true Lease within that Statute, *i. e.* for valuable Consideration, for *J. S.* knew not of it, nor contracted for it, *nor was it at all considered in the Bargain.*

Terra, derived a *Terendo*, strictly signifies arable Land only, but in a legal Sense it comprehends all sorts of Ground. Land built is most worthy, and shall be first demanded in a *Præcipe*; for Things are respected in Law as they are more or less useful to Man. Water is not demandable by that Name, but so many Acres of Land *aqua coopert*. Grant of Land passeth Houses built on it, for *cujus est solum, ejus est usque ad cælum*.

Tho' a Man by no sort of Conveyance can limit a Fee to move out of one Person into another,

Of Fee-simple.

other, as he shall appoint; yet by Custom, a Fee may be moveable: As where 100 Acres have Time out of Mind been set out yearly to several Persons, so many to one, so many to another, so that the Number only is certain, the Place uncertain; so if it be agreed on Partition betwixt Parceners, that one shall have the Land the first Year, or half Year, the other the next, and so by Turns for ever, in which Case the Fee of each of them is several, and moveable, as well as the Possession. *N. 3, That Partitions between Parceners are favour'd and privileged, because their undivided Estate was created, and cast on them merely by Act of Law.*

Grant of *Vestura Terræ* passes the Underwood and Sweepage; but the Soil, Timber or Mines pass not by it, nor by Grant of the Herbage, tho' Livery of Seisin be made. *But it is holden, 1 Vent. 393. that the Grant of Vestura Terræ with Livery passes the Soil, but the Grant of Prima Vestura for no certain Time passes the first Cutting only from such a Day to such a Day it passes the Soil.* If one grants to the Grantee of the Herbage of his Wood all his Land in his Possession, the Whole shall pass, for he is so far possessed of the Whole, that he may have an Action of Trespass for a Trespass in any Part of it. Grant of *separalis Piscaria* passes neither Water or Soil; *Aqua* passes the Water, and *Piscary*, but not the Soil: All the Profits, with Livery, pass the Soil; *Boscus* passes Soil as well as the Timber of any Wood-Land; *Boscus Crescen* passe

passes no less, for *Crescens* is idle, and signifies no more than the Law would have implied. *Alnetum*, and such like Words pass Wood-Land of such sort, but no other. *Pastura* not only passes Land of that Nature; but also Feedings in another Soil. *Pascuum* signifies any Land whatever used for feeding of Cattle. But Land can't be demanded by the word *Pascuum* in a *Præcipe*.

General Words, as Honour, Isle, Castle, will pass Things compound, as Honour, or Castle will pass divers Manors, or Things Simple of different Natures, as *Fearn* will pass Houses, Lands, Tenements; a Plow-Land, or so much as one Plough can till, an Ox-gang, or as much as one Ox can till, may pass Arable, Meadow, Pasture, and Wood, &c. necessary for such Tillage; Grange passes Barn, or Stable, with its Curtilage; Messuage passes House, Orchard and Curtilage; *Stagnum* or *Gurges*, pass Water and Soil, (in a *Præcipe* for *Gurges*, &c. the Esplees must be laid in taking of the Fish;) Forest, Warren, Chase, or Vivary, pass both the Ground and Privilege.

A Grant *de centum libratīs Terræ*, will pass Land of that Value.

Tenement passes any Thing whereof a Man may be seized, *ut de libero Tenemento*; Hereditament, any Thing wherein a Man may have an Inheritance.

If one makes a Feoffment with general Warranty, *i. e.* against all Men, and there is no mention made of the Writings concerning the Land, the Feoffor shall retain all that are material for the Defence of the

Title, and that serve to deraign the Warranty Paramount, *i. e.* That entitle him to vouch some other bound to warrant the Land; but the Feoffee shall have those that concern the Possession, as Court-Rolls; but if the Warranty be only against the Feoffor and his Heirs, the Feoffee shall have all the Deeds; for in the first Case the Feoffor is bound at his Peril to defend the Title, and therefore shall keep what will enable him to do it; in the latter Case he is safe, so long as he impeaches not his own Feoffment.

There be eight formal Parts of a Deed of Feoffment. 1. The Premises, which name the Feoffor and Feoffee, and the Certainty of the Land to be convey'd. 2. The *Habendum*, which names the Feoffee again, and limits the Certainty of the Estate. 3. The *Tenendum*, which must at this Day be of the Chief Lord, by force of the Statute of *Quia emptores Terrarum*. 4. The *Reddendum*. 5. The Clause of Warranty. 6. *In cuius rei Testimonium sigillum meum apposui*, containing the Sealing, which is an essential Part. 7. The Date containing the Day, Month, the Style of the K. and Year of the Lord. It was anciently holden, that a Deed dated before the limited Time of Prescription was not pleadable, therefore they often omitted the Date. If no Place be mentioned, the Feoffee may alledge it made where-ever he will. 8. The Clause of *his Testibus* of late disused, was anciently written by the same Hand which the Deed was, and the Deed was read to the

the Witnesses, and then their Names enter'd.

No Exceptions are good against a Witness, but those that prove him to want Discretion, to be a Party in Interest, an Infidel, or a Person infamous, as one attainted for giving a false Verdict, or of Conspiracy at the K.'s Suit, or convict of Perjury, *Præmunire*, Forgery on the 5th of *El.* or Felony, or one that by Judgment hath lost his Ears, or stood in the Pillory or Tumbrel, or been branded, (*quæ sunt minoris culpæ sunt majoris infamiæ*;) or Champion recreant.

But many Exceptions that are good against a Juror, are not so against a Witness, as Affinity or Consanguinity, how near soever. (*For if a Juror be challenged, his Room may easily be supplied by others; but it is otherwise of a Witness.*) So of Outlawry in a Personal Action. And one named a Disor in the Writ, has been allowed to be a Witness to the Deed; *otherwise the Demandant by a fictitious Supposal, making the Witnesses Parties to the Action, might defraud the Tenant of the Benefit of their Testimony.*

But where the Witnesses in a Deed are to be joined to the Jury, (as they frequently were in former Times, by Process awarded against them, as well as the Jury,) the same Exceptions that are good against a Juror are good against them, because if they should, with the Jury, find it to be the Deed of the Party, no Attaint will lie, for that more than twelve affirm the Deed:

Yet an Attaint will lie against the Jury if they should find that it is not his Deed, for the Witness cannot testify a Negative. *For tho' they may directly swear, that such a Deed is the Party's Deed, they can't swear the contrary; for tho' this may be collected from what they positively swear, their Office is only to testify what they know, not to make Inferences from it.* When Witnesses are joined to a Jury, there must be more than one.

When a Trial is by Witnesses, as of the Challenge of a Juror, or Summons of a Tenant, the Affirmative ought to be proved by two, or more. But when the Trial is by Verdict, Judgment is given on that, and that is given on Evidence. *Violenta præsumptio est plena Probatio*; as if one be stabbed in a House, and another run out of it with a Knife bloody, and none else in the House: *Præsumptio probabilis* moves little, *Præsumptio levis* moves not at all. Wife can't be a Witness for or against her Husband. Nor can a Party to an usurious Contract be a Witness against the Usurer, tho' another informs; for by this Means he would avoid his own Bond.

K.'s ancient Charters of Inheritance had the Clause of *his Testibus*, as those of Nobility still have; in K.'s other Grants, *teste meipso* is at this Day used instead of it.

A Deed of Feoffment may be good without any of the eight formal Parts; as if Land be given to A. and his Heirs, *without any Habendum, &c.* or to hold to A. and his Heirs, without naming him before the
Haben.

Habendum, yet both Deeds are good. For the word Heirs, which alone is an essential Word, is not wanting, and no Deed shall be void, which by any Construction can be made good, but it must be sealed and delivered.

None born out of lawful Wedlock can be an Heir. Nor a Monster, *i.e.* one wanting humane Shape, as having a Dog's Head, but one having Fingers or Toes too many or too few, or Limbs distorted, is no Monster. Hermaphrodites shall inherit according to the Sex that prevails.

An Alien can neither inherit, nor have an Heir; one made a Denizen by K.'s Letters Patent may purchase Lands, and his Issue, born after the Denization, may be Heir to him. One attainted of Treason or Felony can neither inherit, nor have an Heir; and his Blood is so corrupted by the Attainder, that it cannot be absolutely restor'd but by Parliament: But if a Person attainted be pardoned by the King, and purchase Land, and have Issue a Son, and die, such Son shall be his Heir; but if the Father have an elder Son alive at the Time of his Death, born before the Attainder, the younger Son born after cannot be Heir to the Father; for the elder Son, tho' he be disabled to inherit, yet is still the elder Brother, and the Younger cannot be Heir while he is alive.

But the Issue of one made a Denizen shall inherit the Father, tho' he have an elder Brother alive, born while the Father was an Alien; For Denization has not such a Retro-

Retrospect as Naturalization, which makes a Man a natural Subject ab initio; but a Denizen derives his very Essence as a Subject from the Denization, and his Son born before never had any more Right to inherit, than if he had not been his Son at all.

1 Sid. 193.

3 Lev 60.

Vaugh. 274.

2 Ven. 413.

It is clear, that the Sons of one Attainted, born before the Attainder may inherit one another. But my Lord Coke holds otherwise of the Sons of an Alien, or Person attainted; but has been since contradicted, for a Brother may in Mortancestor make himself Heir to his Brother without mentioning the Father.

Outlaws in Debt, Hereticks convict, Persons excommunicate, or attainted of *Præmunire*, Lepers, Ideots, &c. may be Heirs. Child born in second Marriage within nine Months after the first Husband's Death, may be Heir to the first or second Husband, which he pleases. At this Day, an Heir cannot sue a Bond made to his Ancestor.

Fish at large in a Pond, Doves in a Dovehouse, go to the Heir, those that are caught to the Executors.

Nemo est Heres viventis.

3 Rol. Ab.

32. con.

By a Gift to *A.* and his Heir, the Heir can take nothing, not an *Inheritance*, because there is no Possibility of its continuing for ever; not a *Freehold* descendible, because such must continue during Lives in *Esse* only, and no Man can create a new *Estate*. A Gift to *A.* or his Heirs passes a

State

State for Life only; a Gift to *A. and B. & Heredibus*, passes no more for the Uncertainty; but a Gift to *A. & Heredibus*, gives a Fee, without adding *suis*.

A Lease *T.* is made to *J. S.* Parson and his Successors, and after a Release is made to him and his Successors, yet he takes but for Life. For the Word *Successors* in both Cases is void, *in the first, because no sole Corporation, except K. can be possess'd of a Chattel; in the second, because the Release can't enure to him in that Capacity, in which he had nothing before.* Grant by *K. Decano & capitulo habendum heredibus & successoribus suis*, vests in their politick Capacity only: Grant to *J. S.* and his Heirs and Successors, vests in his natural Capacity only; and tho' it may be said, that the *K.* is deceived in using the word *Heirs* in the first Case, and that of *Successors* in the second, yet those Words which were used only to make the Grant more firm, shall not be construed to make it void.

A Gift to *A. & liberis suis*, and their Heirs, gives a joint Fee to him and his Children then born. The word *Heirs* includes all Heirs whatsoever, whether near or remote.

The *Isle of Man*, tho' a Territory distinct from the Kingdom, has been granted under the Great Seal, and is therefore descensible by the Rules of Common Law.

Feoffment is the only Conveyance, which when the Feoffor's Entry is lawful, doth destroy all wrongful Estates, because the Feoffor re-entring to make *Livery*, re-conti-

reverts his former Estate. All corporeal Inheritances *did at Law* pass by Feoffment without Deed: Incorporeal Inheritances *i. e.* such as are neither Tangible nor Visible, pass by Delivery of the Deed. *Charta* properly signifies a Deed of Feoffment by *Factum* any Deed whatsoever. *Do*, is the aptest Word of Feoffment.

A Fee may pass without the word *Heir*.

1. By Devise, by the *express* Intent of the Devisor, as where Land is devised to *A.* and that he shall pay 20 *l.* for it to the Executor; so a Devise to *A.* to give, or sell, or for ever, or in Fee-simple, or to him and his Assigns for ever, or to him, & *Sanguini suo*, give a Fee-simple; but a Devise to *A.* & *semini suo*, gives an Entail only; a Devise to him and his Assigns, gives a State for Life only.

2. By a *Fine sur concessans de droit commun* *quo que*, &c. for it supposeth a precedent Gift in Fee.

3. By a Release of one Jointenant or Partner, to one of the others only, or to all, or by Release of Right by Dis'se to Dis'se, because the Person to whom it is made is seized of a Fee before. In like manner by Release of a Seigniorship or Rent-charge made to the Tenant of the Land; for though for some Purposes it may be said to pass an Estate, it gives no Benefit to the Tenant, but by Extinguishment of the Estate of him that releases.

4. By Recovery, for where a Fee is demanded by the Writ, the Judgment must be intended to pursue it.

5. By Creation of Nobility by Writ, without any Limitation, which of it self ennobles the Blood to a Man and his Heirs lineal, unless the Writ limit it to the Heirs males, &c. But Creation of Nobility by Patent, which is of late more generally used, gives no Inheritance without proper Words.

6. In Gifts that take effect by Reference; as if *A.* give Land to *B.* and his Heirs, and then *B.* enfeoff *A.* as fully as *A.* infeoffed him.

7. In Gifts of Frankmarriage, or Frankalmoin, for the Law had a particular Favour to works of Piety, and the Advancement of Families by such Gifts; and ancient Grants must be expounded, as the Law was taken when they were made.

8. In Gifts to K. or Corporation aggregate; for they never die.

9. In Grant of Rent to a Parcener to make a Partition equal; for it is granted in lieu of her Inheritance of the like Value given her by Law. Vid. Supra; 20.

10. In the Grant of the Privilege of an Assart by K. at a Justice-Seat; for there is a special Law of the Forest.

11. But the words, Heirs or Successors, are absolutely necessary to pass a Fee in all Grants and Feoffments, Releases and Confirmations enlarging Estates, Warranties, Bargains and Sales, &c.

All a Man's Sons shall, by the Custom equally inherit Gavelkind Land; but the Eldest alone shall take a Remainder limited to the right Heirs of the Farther. A Fee may

may be got wrongfully by Dis's'n, &c. by a bare Agreement *in Pais* to a Dis's'n of one's Use.

A Purchaser of Lands in Fee dying without Issue, Brother or Sister, his next Cousin collateral of the whole Blood, becomes his Heir; but his Cousin of the half Blood may be his Heir of a State-tail, *for the Descent of such Estates is governed by the Form of the Gift in which the Donor's Will is contained*. Lineal Descent is in a right Line from Father to Son, Collateral is for Default of lineal Heirs, as to one's Father's Brother, or Grandfather's Brother, &c. *Heres in linea recta præfertur heredi in linea transversali, & propinquior excludit propinquum propinquum remotum, remotus remotiorem.*

One may be next of Kin, *jure representationis*, or *jure propinquitatis*; the former shall take as Heir, the latter by Purchase. As if I have two Nephews, *A.* the elder, and *B.* the Younger; and *A.* have Issue and die without Issue, the Issue of *A.* shall be my Heir for whatsoever the Ancestor, if living, should have inherited, the lineal Heir *jure representationis*, shall inherit but if the Rem'r. had been limited to my next of Blood, *B.* should take it before the Issue of *A.* because he is next, *jure propinquitatis*.

If a Son purchase Land in Fee and die without Issue, his Uncle shall be his Heir, not his Father; for it is a Maxim in Law that Land cannot lineally ascend; yet the Father is next of Blood to the Son, and shall take a Rem'r. by Purchase limited to the

next leading

next of Blood to the Son. And where the Uncle inherits the Son, he is not absolutely Heir; for if the Father have a Son born afterwards, he shall enter upon the Uncle; so if a Sister inherit her Brother, and the Father have afterwards Issue a Son, he shall enter into the Land as Heir to his Brother, and if he have a Daughter and no Son, she shall be Coparcener with her Sister.

Where the Uncle is Heir to the Son, and enters into the Land, or presents to a Church; or gets Seisin of the Rent descended, &c. and dies without Issue, the Father shall have the Land, Advowson, Rent, &c. as Heir to the Uncle; but if the Uncle die before he has gained an actual Seisin, the Father cannot be Heir; or if the Son and Uncle both die seised only of a Rev'n expectant on a Freehold, the Father cannot be Heir, for he that claims as Heir in Fee, must make himself Heir to him that was last actually seised of the Freehold and Inheritance.

The Uncle shall have Benefit of a Warranty made to the Son and his Heirs, but if he die without issue, the Father shall have no Advantage thereof; so the Uncle being dis'sed, should *at Law* have been bound by a Warranty made by the Son to the Dis'sor; but if he had afterwards dy'd without Issue, the Father being his Heir, should not have been bound thereby; for a Warranty always descends to the Heirs of him that made it, or of him to whom it was made. If the Son conclude himself by pleading concerning the Tenure and Services of

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12.

of Land, the Uncle shall be bound by a ne
so shall not the Father, being Heir to on t
Uncle, because he cannot be Heir to Feof
Son; but the Father, as *Tertenant*, shall Heir
bound by Estopels which run with the Land Breac
shall

If a Purchaser of Land in Fee die without Issue, those of his Blood of the Part of his Father shall inherit such Land, and those of the Male Line of the Part of the Father tho' more remote, are always preferred therefore the Brother or Sister of the Father, Father, or of the Father's Father's Father, L. or of any other Ancestor in the Male Line of the Father and their Representatives, shall first inherit on Failure of such Cousins, those of the Blood of the Father's Mother, or of the Father's Mother's Mother, &c. shall inherit. And those of the Blood of the Latter shall not be preferred, because there is a longer Descent of Male Ancestors from her? And if a Purchaser have no Heir of the Part of his Mother, the Heir of the Part of his Mother shall inherit; as the Brother or Sister of the Mother, or of the Mother's Father, or of the Mother's Father's Father, &c. who shall inherit before any of the Blood of the Mother's Mother; but if one die seised of Land which descended to him as Heir to his Mother, any of her Ancestors, the Heirs of the Blood of his Mother only shall inherit it; so that if he die seised as Heir to his Father, it is for whoever takes Land in Fee by Discontinuance must be of the Blood of the first Purchaser.

Pl. C. 448.

A. seised as Heir on the Part of the Part ther, makes a Feoffment, and takes back the State in Fee, and dies without Issue; this gi

d by a new Purchase, and shall go to the Heir
 on the Part of the Father. if he make a
 Feoffment on Condition and die, and the
 Heir on the Part of the Father enter for a
 Breach, the Heir on the Part of the Mother
 shall enter on him; *for the Feoffment being*
defeated, the Land is in such Plight as if
it never had been made. If he make a
 Feoffment, reserving a Rent to him and his
 Heirs, and die, the Heir of the Part of the
 Father shall have it; but if he make a Lease
 for *L. or Y. or Gift in T.* the Heir of the Part
 of the Mother shall have the Rent, as in-
 cident to the Rev'n; so if one seised of a
 Manor, as Heir on the Part of the Mother,
 had made a Feoffment of Parcel thereof be-
 fore the Statute of *Quia emptores*, reserving
 a Rent in Fee, the Heir of the Part of the
 Mother should have had it, as being Parcel
 of the Manor; and if a Man have a Rent-
 Seck of the Part of his Mother, and the
 Tenant grant that he and his Heirs may dis-
 strain for it, his Heir of the Part of the Mo-
 ther, or other shall have the Distress as appurtenant
 to the Rent. If one so seised make a Feoff-
 ment to the Use of him and his Heirs,
 and the Heir (a) of the Part of the Mother shall
 have the Use. If such Heir have a Seigni-
 ory, and the Tenancy escheat to him, the
 Heir of the Part of the Mother shall have
 it. If the Tenant of Land descended from the
 Mother be impleaded, and vouch, and recover
 against the Vouchee and die, the Heir of the
 Part of the Mother shall sue Execution.

Jane S. has issue *A.* and dies, and Land
 is given to *A.* and his Heirs on the Part of
 his

(a) So is the
 Law now
 settled.
 3 Lev. 407.

his Mother, or a Rem'r is limited to the Heirs of *Jane S.* and afterwards *A.* dies without Issue, the Heirs of the Part of the Father shall inherit, because the Fee vested in *A.* as a Purchaser, and no Man can create a new Inheritance; for which Cause, if Land be given to a Man, and his Heirs males, the Law rejects the word Males; yet *Land may be given to a Man, and his Heirs or the Part of the Father.* Litt. Sect. 354. in which Case none of the Heirs of the Part of the Mother shall ever inherit; but in such Case the inheritance, as long as it continues, descends according to the Rules of Law, tho' it be determinable for want of Heirs on the Part of the Father. If there be Lord Fem Mesne, and Ten't and the Fem bind herself and her Heirs to acquit the Ten't and marry, the Ten't grant to the Husband and his Heirs, that they shall not be bound to acquit him; yet after the Death of the Husband and Wife, their Issue, as Heir to the Wife, shall be bound to Acquittal. *For it shall not be in the Power of one Ancestor, by any Act done to or by him, to take from another the Power of binding one that is common Heir to both.*

If one die seised of Land as Heir of the Part of his Father, it shall rather escheat than go to any one that is not Heir of the Part of the Father; so *è converso*, where Lands descend from the Mother. As Land may escheat to the Lord, for want of Heirs of the Blood of the first Purchaser, so may it by Judgment against the Ten't for Felony three Ways, *Aut quia suspensus per Col- lum; aut quia Abjuravit Regnum; aut quia*

utls.

atlagatus; but no Land shall be forfeited by him that is hang'd by Martial Law, *in furore Belli*. The Land whereof one attainted of High Treason was seisd, escheats to K. of whomsoever holden; but if the Son be attainted of Treason, and the Father die seised, the Land shall escheat to the Lord, for the Father dies without Heir. No Land shall be forfeited by outlawry on Process on a *Writ of Appeal* before the *Plaintiff* has counted. but that which the Deft' had at the Time of the Outlawry pronounced; but by Outlawry on an Indictment, all is forfeited which he had at the Time of the Felony done; for in the first Case, the Record whereon the Forfeiture is grounded, shews not the Time when the Felony was committed, but in the second it does.

Vide Supra
11

Land given to a Body Politick, goes back to the Donor, when the same is dissolved.

Land always descends to the worthiest of Blood; therefore the elder Brother, and all his Posterity, shall inherit before the younger, or any of his; and all the Females of the Part of the Father, before any of the Males of the Part of the Mother.

14

None shall be Heir of Land in *Fee-simple*, or to a Warranty, or sue an Appeal of Death as Heir, unless he be of the whole Blood, *viz.* both of the Father and the Mother.

If an elder Brother purchase Land in Fee and die without Issue, his Sister of the whole, not his younger Brother of the half Blood, shall be his Heir; but where the Uncle is Heir to the elder Brother, and
enters

enters and dies without Issue, the younger shall be his Heir, because he is of the whole Blood to him.

If Ten't in Fee of Land, Rent, Seigniorie, Advowson, and Use, &c. have a Son and a Daughter by one *Venter*, and a Son by another, and die seised, and the elder Son die without Issue before actual Seisin, the younger Brother shall have them as Heir to the Father; but if the elder Brother had granted an actual Seisin, the Sister should have them as Heir to him, *quia possessio fratris de feodo simplici facit sororem esse heredem*; which depends upon the Maxim, that whoever claims a *Fee-simple* as Heir, must be Heir to him that was last actually seised thereof, (or to the Purchaser.) But if *A.* seised in special *T.* with a Rem'r in Fee, have two Sons by diverse Venters and die, the elder as Heir in *T.* enter and die without Issue, the younger as Heir to the Father shall have the Fee, because the elder Brother was not actually seised of the Fee-simple, but only of the State in *T.*

If the Father make a Lease *T.* rendring Rent and die, and Lessee enter, and the elder Son die before he has received the Rent, yet the actual Possession of Lessee *T.* is the actual Possession of the elder Brother, and the Sister shall be Heir. So if one enter into the Land as Guardian in Socage, or Chivalry, to the elder Son. But if the Father make a Lease *L.* and die, and the elder Son receive the Rent and die, the younger Brother shall have the Land as Heir to the Father, because the elder Brother was not seised of

the Freehold of the Land ; but if Bastard
Eligne receive Rent reserved by the Father
on such Lease, and have Issue and die, the
Mulier shall be barr'd, *for he cannot prove
the other a Bastard after his Death*

The elder Brother enters, and endows his
Father's Wife of a 3d Part, and dies with-
out Issue, the younger Brother shall have
the Rev'n of the said 3d Part; but if
the elder had made a Lease *L.* and died,
and the Lessee had endowed the Wife, and
Ten't in Dower had dy'd *during the Life
of Lessee L.* the Sister, as Heir to the elder
Brother, should have had this Rev'n:
For in the first Case, the Endowment of
the Wife defeated the elder Brother's Seisin
of the 3d Part, *and the Rev'n thereof de-
pended on an Estate which the Wife was in
from her Husband, so that in Judgment of
Law a Rev'n only descended;* but in the o-
ther Case, the Rev'n depended on a Lease
made by the elder Brother.

The Son's general Entry into a Parcel of
Land, gives him an actual Seisin of all the
Land in the same County whereof he is sei-
sed in Law; but where another is seised of
the Land to which he has a Demand, in re-
spect of a Diss'n, Alienation in Mortmain,
Condition broken, &c. his general Entry in-
to Part, is good for so much only.

There shall be no *possessio Fratris* of a
Rent, Advowson, Common, &c. If the elder
Brother die before the Church becomes void,
or the Rent due, &c. But a Husband shall
be Ten't by Courtesy in Respect of his
Wife's Seisin in Law, where it was impossi-
ble

ble for him to get an actual Seisin, for in the first Case it stands indifferent whether the Heir of the Father or Son shall have the Land and therefore the actual Seisin of either of them shall decide it; but in the Second, the Favour which the Law shews to the Husband that has Issue by his Wife, shall not be lost without some default in him.

The Possession of the elder Brother shall not exclude the younger, and make the Sister his Heir of an Estate T. or a Dignity or Crown-Land; for in these Cases the Law regards him that is Heir to the first Donee, or to him that was first created Noble, and the Crown-Lands *jure Coronæ* attend the Crown; and if the King purchase Gavelkind Lands to him and his Heir it shall descend to his eldest Son only, and if he have the Crown as Heir to his Mother, such Land shall descend to the Heir of the Part of the Mother; if the right Heir be attainted, yet shall the Crown descend upon him, and when he takes (a) upon him the Royal Dignity, the Attainder is discharged.

The word *Inheritance* is not only properly used where one has Land by Descent, but where he has Land in Fee, or Tail by Purchase; as in a Writ of Right, or *Cui in Vita et Râ*, for Land purchased, the Words of the Writ are, *quam clamat esse jus & hereditatem suam*. But in the Stat. of W. 2. c. 5. by Construction of the whole, 'tis taken only for the Wife's Inheritance by Descent.

One may have an Inheritance, tho' he neither take it by Descent, nor properly by Purchase, but by Creation; as where the King

ing creates a Man a Peer by Letters Patents, or by Writ: The first ennobles a Man, so' he never sits in Parliament, but the second does not until he sits there; for the issue, whether he be a Baron or no, must be tried by the Parliament Records; therefore a Peer of another Kingdom cannot be sued here by that Name. One may be made Noble for Life only, not for T. A Woman marrying a Peer is thereby made Noble during her Life, unless she afterwards marries a Commoner; but one born Noble continues so let her marry whom she created will.

Of Things whereof one may have a manual Occupation, Possession, or Estate, as of Lands, Rents, &c. he shall plead that he is seised in *Dominico suo, ut de feodo*; of Things which lie not in such manual Occupation, as an Advowson, &c. he shall say, that he is seised *ut de Feodo*. It may be observed from hence, that in Judgment of Law, a Man can receive no Profit of an Advowson, therefore at Common Law no Damages were recoverable *in quare Impedit*, and a Guardian in Socage cannot present, because by Purchase can take nothing for it, and he shall meddle with nothing, but what he may be liable to account for: In a Writ of Right of Advowson, the Patron shall lay the Esplees, by Common in himself, but in the Incumbent.

There is a great Difference between *Advocatio medietatis Ecclesiæ*, & *medietas Advocationis Ecclesiæ*; the first is when there be two several Patrons and Incumbents of the same Church, in which Case, if either Patron

17.

18.

be disturbed, he may have a *quare Impedit*, &c. *presentare ad medietatem Ecclesiæ*, or he may have a Writ of Right *de Advocatione medietatis*, and either Incumbent may have a *Juris utrum* against the other. *Medietas Advocationis* is when an Advowson descends to two Parceners, and they agree to present by Turns; in which Case, either of them, in her Turn, if disturbed, may have a *quare Impedit*, &c. *presentare ad Ecclesiam*; but if either of them bring a Writ of Right, it must be, *de medietate Advocationis*. As there may be two several Parsons of one Church, so two Men may make but one Parson.

One can't have a larger or greater Estate, than a Fee-Simple, whether it be absolute or qualify'd; and there cannot be two Fees-Simple of the same Land in the same Person. If the K.'s Donee be attainted of Treason, or convey the Land to K. both the Fees are consolidated into one; and yet there may be a Fee-Simple qualified in one Person, and a Reversion in Fee in another by Act of Law, as where the Lord enters on his Villein, being a Donee in Tail, the Reversion in Fee continues in the Donor; but one Fee can't depend on another by the Act of the Party, therefore a Remainder limited on a base Fee is void.

Purchase, in Latin *Acquisitum* or *Perquisitum*, is the Possession of Tenements which one has by his own Deed or Agreement, and not by Descent; it is always intended to be by Title, and most properly by Conveyance, whether made freely without any Consideration, or for Money, &c. But

those

those that claim merely by Act of Law, as Lord by Escheat, Tenant in Dower, or by Courtely, cannot be said to be Purchasers.

If a Monument, &c. set up in a Church in Honour of my Ancestor, is defaced by the Parson, or any other, I may have an Action on the Case against him, and some say, that the Wife or Executors that set it up may have an Action. By Custom the Heir may have some Chattels, as Heir-Loom, (as the best Bed, Table, &c.) and shall sue for them only at Common Law. The ancient Jewels of the Crown are Heir-Looms, and not devisable.

Of FEE-TAIL.

19.

THose Inheritances which are made Estates Tail by *W. 2.* were Fees-Simple conditional at Common Law, and are still descendible in the same Manner as before; the Donee having Issue inheritable alive, was before the said Statute esteemed to have performed the Condition to three Purposes. 1. To alien the Land. 2. To Forfeit. 3. To Charge it. But if he had died without Alienation, the Land should not have descended to any collateral Heir, viz. to one not within the Form of the Gift; and if the Issue had died before the Donee had alien'd, he having no Issue at the time of the Alienation, could not bar the Donor of his Reverter on Failure of Issue, but he might bar the Issue born after, because he claim'd a Fee-Simple *as Heir*. A Feme Donee might with her Husband, by levying a

Fine, bar the Issue; but if they had alien'd without Fine, the Issue should have had a *Formedon in Descender*. These Rules held as to the King, whether he were Donor or Donee, but he could never be barr'd of his Possibility of Reverter by Alienation with Warranty, before Issue had, without Assets.

W. 2. has so appropriated the Land to Tenant in Tail, and the Heirs of his Body, that if Land be given to a Man, and the Heirs of his Body, to the Use of another and his Heirs, the Limitation of the Use is void.

Tenant in *T.* is either in *T.* general, or special: Tenant in *T.* general, is where Land is given to one and the Heirs of his Body.

20 Tenement, which is the only Word used in *W. 2.* includes not only Land, but Things issuing out of, concerning or annex'd to Land, or exercisable in a certain Place, as Rents, Estovers, Uses, Charters, Names of Dignity, as Duke, &c. of such a Place, Advowsons, local Offices, as of the Marshal of *England*, Chamberlain of the Exchequer, &c. And as Tenant in *T.* cannot bar his Issue by his Alienation of the Land it self, so neither can he bar him of a Warranty annex'd to such Estate, or of a Writ of Error, or Attaint.

But Things meerly Personal, as Annuities, the Office of a Faulconer, and such like, can't be entail'd.

The word Heirs is absolutely necessary in all Gifts in Tail, therefore a Gift to one and *Semini suo*, or *exitibus*, or *prolibus de*

Corpore

alien'd, *Corpore suo*, give him but an Estate *L.* but the word Heirs may be supplied by Reference, as where Land is given to *A.* and the Heirs of his Body, Rem'r to *B.* in forma *Predictâ*: If a Lease *L.* is made to *A.* Rem'r in *T.* to *B.* Rem'r to *C.* in forma *Predictâ*, the Remainder to *C.* is void for the Uncertainty, but if it had been limited to him in *eadem forma*, it had been good, for *idem semper refertur proximo antecedenti*. The Words *de Corpore suo*, may be supplied by others Tantamount, as *de se*, or *Carne sua*. Some say, that a Gift to the Grandfather, and his Heirs begotten by the Father, is good, and that the Grandfather's Wife is Dowable.

Tenant in special *T.* is when Land is given to two, and the Heirs of their two Bodies, in which Case they have an Inheritance immediately, tho' they be both unmarried, or marry'd to different Persons. It has been said, that if Land be given to *A.* and the Heirsof his Body, *habendum* to him and his Heirs, that he shall have a State *T.* with the Fee expectant, for otherwise the *Habendum* would be void; and it seems that the Law is the same, where the Land is given to one, and his Heirs *habendum* to him and the Heirs of his Body, for the Fee Simple given in the Premises by the word Heirs shall not be taken away by the *Habendum*, unless the express Purport thereof enforces such Construction; as when Land is given to *A.* and his Heirs *Habendum* to him and his Heirs, if he have Heirs of his Body, and if he die without Heirs of his Body, that it shall re-

Corpore suo C 3 vert

vert. If a Man make to another two Deeds of one Acre, and by the one give it in *T.* by the other in Fee, and make Livery according to both, it is said that it shall enure by Moieties, *i. e.* to pass a State *T.* in the one Moiety, with a Fee Expectant, and a Fee-Simple in the other.

A Gift of Land to *A. habendum in liberum Maritagium cum B.* gives them both a State in special *T.* whether *B.* be a Man or Woman, so that he be of the Blood of the Donor, and notwithstanding *B.* is not named before the *Habendum*, and the Gift is not made expressly to *B.* but to the other, *Habendum cum B.* yet it gives *B.* an immediate Inheritance; but the Donee, that is the Cause of the Gift, must (if the Thing given lie in Tenure) hold of his Donor; therefore upon such Gift, if the Rem'r in Fee be limited to a Stranger, the Donees have a State *L.* only, because there is no Reversion in the Donor, and consequently no Tenure of him; and for this Cause, such Estate cannot be made by Will, nor could it be made by *Cestuyque Use* before the 27th of *H. 8.* And the Donees must hold by Fealty only; therefore a Rent reserved on such a Gift is void, till after the fourth Degree, for a Reservation or Proviso repugnant to the Estate which they would restrain are void; but in the Case above, the Rem'r limited on such Gift is good, for it passes with the Livery of Seisin, and shall not revert to the Donor against his own Grant. If *K.* give Land in special *T.* the Survivor shall be Tenant in Tail. *Apres, &c.* But if *K.* make a Gift in Frank-

Frank-marriage, and the Donee that was the Cause of the Gift die without Issue, the Man shall not hold it for his Life, as he should have done, if the Gift were made by a Subject. Donees in special *T.* being divorc'd *causa Præcontractus*, both shall hold the Land for their Lives; but Donees in Frank-marriage being so divorc'd, the Donee only that was the Cause of the Gift shall have it; *for in the first Case, the Inheritance, which includes a State L. was indifferently given to both; in the Second, the Gift is made to the Stranger only in respect of his Alliance to the Donor by the Marriage, which by such Divorce is declared void.* If Donees in special *T.* die, &c. their Issue being under 14, the Cousin of either, who can first get the Custody of him, shall be his Guardian in Socage; but the Cousins of the Donee in Frank-marriage that was the Cause of the Gift, shall alone be Guardians in Socage of the Issue.

Talliare est ad quandam certitudinem ponere, the most restrain'd State-Tail, is that to one and his Wife, and one Heir of their Bodics, and to one of the Body of that Heir: *But (a) Q. If such Heir may not be rather said to take by* (a) Pl. C. 291. *Way of Remainder than Descent.*

If one make a Gift in *T.* without saying any more, the Reversion of the Fee Simple is in the Donor by Construction of *W. 2.* A Reversion is when the Residue of the Estate remains in him that made the particular Estate. *A.* Seised in Fee, makes a Feoffment to the Use of *B.* for Life, of *C.* in *T.*

Remainder to his own Right Heirs, the Remainder is void, for the Feoffor has an Use for his L. by Construction of Law; *because, if the particular Estates determine during his Life, it must revert to him again, and consequently the Fee-Simple is also in him, for whenever the Ancestor takes a State L. and afterwards in the same Conveyance there is a Limitation to his Heirs, the Fee vests in the Ancestor, nor can a Man put the Fee in Abeyance by a Limitation to his own Heirs, as he may by a Limitation to another's Heirs, because his own Heirs are as it were included in himself while he lives, and after his Death take only as coming in his Stead, and representing him.* For which Cause, if a Man make a Gift in T. or Lease L. the Remainder to his own right Heirs, or to the Heirs Male of his Body, these Remainders are void; but if one make a Feoffment to the Use of himself for L. Rem'r to the Use of the Heirs Male of his Body, this is a good State T. executed in himself, *for the Feoffees must be seised to such Uses as the Feoffor directs, who may limit them to himself as well as to a Stranger, and the Statute executes the Possession to cestuyque Use in the same Plight, Quality and Degree in which he took the Use.* And therefore, if A. infeoff B. to the Use of himself in T. Rem'r to the Use of B. in Fee, in which Case the Estate of A. is executed by the Statute, and that of B. is good at Common Law, yet the Estate vests in B. as a Remainder, *for he takes the Use by way of Remainder.*

In all Cases where one makes a Feoffment without valuable Consideration to divers particular Uses, so much of the Use as he disposes not of, remains in him as his ancient Use, and the Lord by *Kt's* Service, of whom Part of the Lands contained in the Feoffment was holden, that had the Priority of others before, hath it still; and the Heir of the Part of the Mother, or by Custom of *Burgh Eng'*, or Gavelkind, shall inherit, as if no such Feoffment had been made.

At Law, if one made a Feoffment without any Reservation, the Feoffee held of the Feoffor by the same Services by which the Feoffor held over; *for it would be hard to make the Feoffor and his Heirs for ever, liable to perform the Services to the Lord Paramount, and to give him nothing in the Land wherewith to discharge them:* And the same Construction has been made as to Donor and Donee since *W. 2.* but Lessee *L. or T.* shall hold by Fealty only, if nothing be reserved. If Tenant by Grand-Serjeanty had made a Gift in *T. before 12 Ca. 2. 24.* without any Reservation, the Donee should have holden by *Kt's* Service; but the Donor might have reserved a Tenure in Socage, for a special Reservation excludes the Tenure created by Law. If a Husband seised of *Kt's* Service Land in Right of his Wife, had made a Gift in *T.* the Donee should have holden of him by Fealty only, because the Husband's Rev'n was wrongful, *and gain'd by Discontinuance of the Wife's Estate, and the Woman was Tenant in Right to the Lord.*

A. holds *B.* Acre by 4 *d.* and *W.* Acre by 12 *d.* and makes a Gift in *T.* of both, he has but one Rev'n, and yet shall make several Avowries in respect of the several Tenures over. If a *Mesne* hold of his Lord by 12 *d.* and the Tenant hold of the *Mesne* by 4 *d.* and make a Gift in *T.* and die without Heir, the Donee shall hold of the *Mesne* by 12 *d.* by the same Construction of Law by which he held of the Tenant by 4 *d.* before.

24.

But Donee in Frank-marriage holds by Fealty only till the fourth Degree is past, and afterward by the Services by which the Donor holds; for then their Issues by *Ecc.* Law may intermarry. A Degree of Consanguinity is caused by the Addition of one Person to another, in the Line ascending or descending. *Civilians* computing what Degree of Kin two Persons stand in, begin with one, and ascend to the common Ancestor, and then descend to the other; the Canonists descend from the Common Stock till they come to each, and in the same Degree in which they are distant from the common Stock, they reckon them distant from one another; if one be farther removed than the other, they reckon them both in the more remote Degree. So it appears that the *Civilians* put them in the second Degree, whom the Canonists put in the First, &c. In computing Degrees in this Case of Frank-marriage, the Donor and Donees make the First. We compute by the Canon Law

Many Cases, tho' out of the Letter of *W. 2.* yet being in the same Mischief, are taken by the Equity of it; for Equity in *paribus rationibus paria jura desiderat, & est perfecta quedam ratio, quæ jus scriptum interpretatur & emendat.* Therefore Gifts in *T.* Male or Female are within the Statute, by Force of which Gifts the Heirs of one Sex only shall inherit; but a Female can't purchase by the Name of Heir Female, unless she be absolutely Heir; as if Land be given to *A.* for *L.* the Rem'r to the Heirs Females of *B.* and *B.* have Issue a Son, and a Daughter, and die, the Daughter cannot take the Rem'r, because she is not Heir, and tho' *W. 2.* secured an Estate *T.* when vested in the Donee, from being alien'd, yet it altered not the Rules of Common Law, concerning Names by which such Estate may be purchased.

Those that inherit by Force of a Gift in *T.* Male, (whether such Estate be made by Act executed, or by Devise,) must convey the Descent to themselves wholly by Heirs Male, so *è converso*, where a Gift is made in *T.* Female; but the Son of a Female may have an Appeal for the Death of his Ancestor, tho' the Mother could not have it, so may the Uncle being Heir on the Part of the Mother, for *Magna Charta* 34. only disables Women from bringing an Appeal as Heirs, and extends not to their Issue: *Sed Q.* If Land be given in *T.* Male, Rem'r in *T.* Female, and Donee have Issue a Daughter, who hath Issue a Son, this Son is not inheritable to either Estate *T.* there-
fore

fore it is safest to limit the Rem'r in *T.* general. But if *A.* have Issue a Son, who hath Issue a Daughter, and *A.* and the Son die, and a Rem'r is limited to the Heirs Females of *A.* the Daughter shall take the Rem'r as a Purchaser. A Rem'r in *T.* is given to *B.*'s next Heir Male, he has Issue two Daughters, they have Issue two Sons, the Father and Daughters die, some say that neither of the Sons take, for the Uncertainty; some say that the Son of the Eldest only, because worthiest; others that both, for they make but one Heir.

A Gift to the Husband of *A.* and the Wife of *B.* and the Heirs of their two Bodies, gives 'em a State in special *T.* presently. A Gift to two Husbands and their Wives, and the Heirs of their Bodies, gives them a joint Estate for *L.* and several Inheritances in special *T.* viz. to the one Husband and his Wife in the one Moiety, and the other Husband and his Wife in the other Moiety: *Which is the most natural Construction.* But a Gift to two Men and one Woman, and the Heirs of their Bodies, gives each of the three a joint Estate for *L.* and several Inheritances; for they can't have one entire Inheritance, because there cannot be one Heir of the Body of all three.

26.

A Gift to a Man and his Wife, and to the Heirs of the Body of the Husband begotten, makes him Tenant in general *T.* her Ten't *L.* A Gift to Husband and Wife, and to the Heirs of the Husband that he shall beget on her Body, gives him spec. *T.* her a State *L.* so *è converso*, when
Land

Land is given to them Two, and the Heirs of the Body of the Wife in general, or to the Heirs of her Body begotten by the Man. But a Gift to them two, and the Heirs that he shall beget on her, gives them both a special *T.* for the word Heirs, which alone is operative, is limited to one no more than the other. A Gift to them two, and the Heirs of the Body of the Survivor, creates *T.* general, but it shall not vest, till there be a Survivor. A Gift to one and the Heirs of his Body, is as good as a Gift to him and his Heirs of his Body. A Gift to *A.* and his Heirs on *B.*'s Body begotten, gives *A.* a special *T.* *B.* nothing, and tho' tis not said who shall beget them, yet it must be intended that they are to be begotten by the Donee.

A. has Issue *B.* and dies, a Gift is made to *B.* and to the Heirs of the Body of his Father, this is a good Entail, for Heirs of the Body of his Father, is a good Name of Purchase. A Gift to *Mawd.* and to the Heirs of her deceased Husband on her Body begotten, (she having a Son and a Daughter by him,) gives her a State for *L.* and the Son a State in *T.* and if the Son die without Issue, his Sister shall recover *per formam Doni*, and name herself Sister and Heir to him in the Writ, because she can have no other, and yet the Land did not properly descend from him; but she takes as he himself did, as Heir of the Body of *A.* But in the same Case, if the Heirs of the Body of the Husband had been named after the *Habend.* they had taken nothing;
for

27.

for they could not take a present Estate in Possession, because not named before the Heir-bend. nor by way of a Rem'r, because there is no Mention of any Estate, but only of such which is to take effect presently. One Parcener in Fee gives her Part to her Sister, and to the Heirs of the Body of her Father, the Donee has a State *T.* in the one Moiety of her Sister's Part, and an Estate for *L.* in the other, for she cannot take an Inheritance in the Whole, by the Name of Heir of the Body of the Father, because she is his Heir but in Part. A Gift to *A.* and his Heirs of the Body of his Father gives him a Fee, for the Deed expressly gives the Land to him and his Heirs; but this cannot be a State in *T.* for those that inherit such Estate, must claim it as Heirs of the Body of him from whom they claim as Heirs, therefore it must be a Fee.

A Gift to *A.* and his Heirs Males, creates a Fee-simple, for 'tis not limited from what Body the Heir must Issue, which to make a State *T.* is necessary to be done by express Words, or others equipollent.

Such Words in a Will, give a State in *T.* Male; but *K.*'s Grant with such Words is void, for the King is deceived; and the Parliament alone can make a new State of Inheritance. But Arms in which one has a Fee, descend to the Heirs Males only; for they only are able to bear them: But the Females may in a Lozenge, or under a Curtain, express of what Family they are by the Arms belonging to it, and the Husband may quarter them with his own. The

Dutchy

late in the He. e there only of One. er Sif. of her in the an E. cannot by the Father. A Gift his Fa- ced ex- Heirs; r those it as n they a Fee. es, cre- d from, hich to one by
 Dutchy of *Lancaster* was entailed to *Ed. 4.* and his Heirs, Kings of *England*; *Hen. 6.* granted to *J. T.* that he and his Heirs, Lords of the Manor of *Lisle*, *ex nunc Dem. & Barones de Lisle, Nobiles & Proceres Regni habeantur*; by this *J. T.* had a qualified Fee in the Dignity; so where a Grant was made to *A.* and his Heirs, Lords of the Manor of *D.* In Gift of Gavelkind Land to *A.* and his eldest Heirs, or of other Lands to *A.* and the eldest Heirs Females of his Body, the Law rejects the word Eldest.

Of Ten't in Tail after Possibility of Issue extinct.

ate in Words and the state of e has a y; for ut the nder a ey are e Huf. . The Dutchy
When Land is given to Husband and Wife in special *T.* and one of them dies without Issue; or if they have Issue, and one of them die, and then the Issue die without Issue, so that no Issue be alive which can inherit by Force of the *T.* the surviving Donee is Ten't in *T. Apres, &c.* so when a Gift is made to a Man and his Heirs which he shall beget on the Body of his Wife, and she dies without Issue, the Husband becomes Ten't in *T. Apres, &c.*

Such Ten't has 8 Qualities, that Ten't *L.* has not. 1. He shall be dispunishable for Waste. 2. Not compellable to attorn. 3. He shall not have Aid of him in Rev'n. 4. On his Alienation no *consimili Casu* lies 5. After his Death, no Writ of Intrusion. 6. He may join the Mife in a Writ of Right in

in a special Manner. 7. In a *Præcipe* by him, he shall not name himself Ten't *L.* 8. In a *Præcipe* against him, he shall not be named barely Ten't *L.* But none of these Privileges can be transferred to his Assignee.

28.

In four Respects his Estate has the same Qualities with a State *L.* 1. It may be forfeited by a Feoffment, &c. made by him. 2. It may be drowned by a State of Inheritance descending on him. 3. It may be exchanged with a State *L.* 4. He in Rev'n or Rem'r shall be received on Default of such Ten't.

While both Donces are alive, tho' never so old, they can't be Ten'ts in *T. Apres*, &c.

Vid. Cro.

315.

2 saund.

383, 387.

Land is given to *A.* and his Wife for their *L.* the Rem'r to their first Issue Male in *T.* Rem'r to them in *T.* they having no Issue Male at the Time, are Ten'ts in special *T.* executed, *for since the Rem'r limited to the Issue Male, can't be in Esse before his Birth, there is nothing to divide their Estate L. from the Inheritance, which for the Time drowns the Estate L.* The Birth of a Son makes them Ten'ts *L.* the Rem'r to the Son in *T.* the Rem'r to them in special *T.* But if the Husband die, having no other Issue, and then the Son die, the Wife shall have the Privileges of Ten't in *T. Apres*, &c. In Respect of her Rem'r of such Estate, but she still continues Ten't *L.* for such Rem'r cannot drown the State *L.* which is as great an Estate.

When Land is given to Husband and Wife

Wife in special *T.* and then they are divorced, *causa Præcontractus* or *Consanguinitatis*, they become bare Ten'ts *L.* for the Act of God alone, *viz.* dying without Issue, can make Ten't in *T. Apres.*

If Land be given to *A.* and his Wife, and to the Heirs of the Body of *A.* Rem'r to them both in special *T.* such Rem'r is void, for it can't take effect till *A.* dies without Issue; and when he does, it is impossible that he should have any Heir of the Body of himself and his Wife.

Of Ten't by Curtesy.

IF a Man marry a Woman seised of a State of Inheritance, and have Issue of her born alive, which possibly might inherit as Heir to her of such Estate, he shall hold the Land by Curtesy of *England* during his Life.

27.

The Wife must be actually seised; but if actual Seisin cannot be had, Seisin in Law is sufficient; as if the Wife seised of Rent, or of an Advowson, die before the Rent becomes due, or the Church void, the Husband shall be Ten't by Curtesy: so if the Wife be seised of a Seigniorie suspended for Years only, but not if it were suspended for a State of Freehold; but in all Cases she must have an Inheritance, and tho' her State being in *T.* determine for want of Issue, yet he shall be Ten't by Curtesy. But if a Woman make a Gift in *T.* reserving a Rent to her and her Heirs, take Husband and have Issue, and Donce die without Issue,

Vid. Supra.
23.

hue, and Wife also die, he can't be Ten't by Curtesy of this Rent. *For the State T. being determined, the Rent reserved upon it must of consequence fail.* But he shall be Ten't by Curtesy of a Rent granted in T. to his Wife by one that has a Fee in it, tho' the Wife die without Issue, because the Rent remains. One can't have a Right, Title, Use, Rev'n or Rem'r expectant on a Freehold, as Ten't by Curtesy, or Dower. A Woman Ten't in T. makes a Feoffment, and takes back a State in Fee, marries and dies, the Issue in a *Formedon* shall recover against the Husband, by Force of the State T. and consequently defeat his Title of being Ten't by Curtesy, which depending on the Estate whereof the Wife was seised during the Coverture, must fail when that is defeated.

The Issue which shall entitle a Man to be Ten't by Curtesy, must be born in the Life of the Wife, therefore it is not enough that it be rip'd out of her Womb after her Death, and it must be born alive, which may be proved by Motion, &c. as well as by Crying, and it must have humane Shape. But it is not requisite that the Issue be alive when the Land descends or comes to the Woman: For if she be dis'sed, have Issue and die, the Husband shall enter; so if the Issue be born and die before the Land descends to the Wife. By the Custom of Gavelkind, one may be Ten't by Curtesy without having any Issue.

After Issue had, the Husband is called Ten't by Curtesy initiate, and he alone, without

without his Wife, shall do and receive Homage, and is sole Ten't to the Lord's Avowry, and if he make a Feoffment, his Feoffee shall hold during his Life, for such Feoffment cannot be a Forfeiture, because the Feoffor was seised of the Inheritance; but if he enter for Breach of a Condition annexed to such Feoffment, and the Wife die, he shall not be Ten't by Curtesy, for his Title to the Ten'cy by Curtesy was extinct by the Feoffment; as when the Lord disses his Ten't, and makes such Feoffment, this is a *Release in Law*, and shall extinguish the Seigniorie as much as a *Release in Deed*, and the Re-entry shall not revive it, for the Condition was annexed to the Feoffment, and not to the Release, and the Re-entry for Breach of the Condition shall not revive such Things as were absolutely destroyed by the Feoffment. If one marry the K.'s Niese by Licence, he shall be Ten't by Curtesy of Land descended to her, for she is enfranchised during the Coverture. But the K.'s Villein's Wife shall not be endowed, for he still remains the K.'s Villein. If Land descend to a Wife that is an Ideot, yet on Office found the K. shall have the Custody of the Land, and after the Wife's Death, the Husband shall not be Ten't by Curtesy. *Sed Q. for the Fee and Freehold were in the Wife, and the Wife of an Ideot shall have Dower.* But one may be Ten't by Curtesy of a Castle built for the Defence of the Realm, or of a House, that is *Caput Baronie*, or of a Common, *sans Nombre*

bre, tho' a Woman shall not be endowed of such Things.

The Ten'cy by Curtesy is consummate by the Wife's Death.

Of Ten't in Dower.

31.

WHere a Man is seised of such an Inheritance, that the Issue which he may have by his Wife, may by any Possibility inherit, as Heir to her of such Estate, she shall be endow'd of the third Part in Severalty, if she be past the Age of 9 Years at his Death, whether she had Issue by him or not.

Ten't in Dower is much favour'd in Law: She shall be free from Toll; nor shall she be distreined for Debt due to K. by her Husband.

The Wife of an Alien, or one attainted of Treason, or K.'s Villein, shall not have Dower. But the Wife of an Ideot, one attainted of *Præmunire* or Heresy, or of a common Person's Villein, shall be endowed. So shall a Niese being married to a Freeman, and the Wife of one attainted of Felony by the 1st of E. 6. ca. 6. and 5th of E. 6. cap. 11. The Husband's Seisin in Law is sufficient to give the Wife Title of Dower.

The Rule, *Dos de dote peti non debet*, is thus to be understood, where the Grandfather dies seised of 3 Acres, and the Father enters and endows the Grandfather's Wife of one Acre, and dies, the Father's Wife shall be endowed only of the 3d Part of the

the other two Acres; for inasmuch as the Grandfather died seised, in Judgment of Law there was no Mesne Seisin betwixt him and his Wife: But if the Father had claimed the said 3 Acres by Purchase from the Grandfather, his Wife should, after the Death of the Grandfather's Wife, have been endowed of the 3d Part of that Acre, whereof the Grandfather's Wife was endowed; or in the first Case, if the Son, after the Death of Grandfather and Father, had endow'd his Mother first, and then the Grandmother had recovered a 3d Part against her, the Mother after her Death might have enter'd again; for her Estate in the Part so recovered, was defeated only for the Grandmother's Life.

The Husband's Seisin for an instant only, gives the Wife no Title of Dower, as the Seisin of *Cestuyque Use* before the 27th of H. 8. making a Feoffment; or of the Conusee of a Fine that grants and renders to the Conusor.

If Husband exchange Land, she may chuse to be endowed either of the Land given or taken in Exchange.

She shall not be endowed of a Castle for the Defence of a Realm, nor of a House that is *Caput Baronie* or *Comitatus*. This is to be understood of Baronies by Tenure, which are now extinct, and were anciently Castles of Defence.

3 Lev. 401.

If Ten't *T.* make a Feoffment, and take back a State in *T.* and marry, and die, the Issue is remitted, and the Wife not Dowable. But if she demand Dower, the Ten't must

must not plead *nunques Seisic que Dower*, but the special Matter.

An Alien, or Infidel is not dowable, except the Queen, being an Alien; and it was adjudged that the Wife of *Edmond*, *Ed.* the First's Brother, tho' she was an Alien, should be endowed of the 3d Part of his Lands in Fee.

32.

Of Things entire, she shall be endow'd in a special Manner; for Example, she shall have the 3d Toll-Dish of a Mill, the 3d Day's Work of a Villein, the 3d Part of the Profits of a Fair, or the Profits of the Office of Gaoler, the 3d Fish taken in a Pischary, the 3d Presentation, every 3d Tythe Sheaf, &c. for what she shall have must be ascertain'd, and she shall not be endowed of a 3d Part in common with the Heir.

She shall not be endowed of Rent reserved on a Lease *L.* but of a Rent reserved on a Gift *T.* she shall, for such Rent is an Inheritance: If Lessor *T.* marry, and die, the Wife shall have the 3d Part of the Rent reserved, and of the (a) Rev'n.

(a) Vid.
Br. Dower
89. Cro.
El. 564.

She shall not have Dower of common *sans Nombre en gross*, nor of an Annuity, nor of Rent whereof the Freehold was suspended before, and during the Coverture: But she shall be endow'd of Rent extinguish'd by the Husband's Release after the Coverture.

Tho' the Heir improve or impair the Value of the Land, she shall have her 3d Part according to the Value at the Time of the Assignment.

Sponte

(*facta*,
Sponte (a) *virum Mulier fugiens, & adultera* (a) W. 2. 34.
Dote sua careat, nisi sponsi sponte retracta.

Divorce à *Vinculo* bars Dower, divorce à *Mensâ & Thero* only does not.

A Wife endow'd by Metes and Bounds, according to common Right, shall avoid all Charges made after her Title; one endowed against common Right shall not: But the Wife of Ten't in Common, and in some Cases the Wife of one Sole seised, shall not be endow'd by Metes and Bounds; as if Husband seised in Fee in feoff 8 Persons, and die, and the Wife bring a Writ of Dower against them all, and two of them confess the Action, and the other six descend to Issue, she shall recover the third Part of two Parts of the Land in 8 Parts to be divided, and when she has Judgment against the other six, she shall have a Third of six Parts of the same Land in eight Parts to be divided.

She can't enter into her Dower before 'tis assigned to her. *Magna Charta* gave her Forty Days, Old Law gave her a Year to continue in her Husband's House after his Death, but she lost both by marrying again.

The Statute of *Merton* gives her Damages from the Death of her Husband; but they shall be recovered only in Writ of Dower, *unde nihil habet*; not in Writ of Right of Dower, for Damages are not recoverable in any Writ of Right; nor in Writ of Dower *ad Ostium Ecclesiæ, &c.* because

Sponte

because she may enter into such Dower without Suit: The Husband also must die seised of the Freehold and Inheritance; and she must not delay herself: She must be able to prove a Demand of the Dower, for *tout Temps Prist* is a good Plea for the Heir, to bar her of the *Mesne Profits*; but 'tis no Plea in a Writ of *Aiel. &c.* for there the Ten't has no Title, and holds merely by Wrong. Note the Case where the Tenant pleaded as to Part *non Tenure*, and as to Part Detainment of Charters, and both these Issues being found against him, the Demandant recovered the Value from the Husband's Death, tho' the Jury found further, that the Demandant with her Son had taken the Profits for 6 Years of the Time, therefore beware of false Pleas:

1 Syd. 252.

1 Lev. 163

And Note that Pleas in Abatement being found against him that pleads them, are peremptory against him. This Statute extends to Dower of Copyholds, but Damages are not given where Dower is assign'd in Chancery, nor where the Heir or Feoffee assign Dower; for she must recover by Plea, and not be able to recover without it. Husband seised in Fee grants a Rent, makes a Feoffment, takes back a State *T.* and dies, she surmising that he died seised, prays her Damages, she shall hold the Land charg'd, for by her Prayer, she accepts herself Dowable of the 2d Estate.

Let the Husband be never so young, yet if she be past the Age of 9 Years at his Death, she shall be endowed, tho' he alien'd the Land before she came to that

Age, for the Possibility which the Law gives her of having Title of Dower, if she arrive at that Age, shall not be defeated by the Act of the Husband. And if he alien his Lands, and then she be disabled by Attainder and pardoned, she shall have Dower. *For tho' the Title of Dower be not consummate till the Husband's Death, yet by the Marriage it so vested in the Wife, that no Act of the Husband can bar it, nor is it forfeited to the K. by the Attainder, and tho' she be disabled to claim it during the Attainder, yet when that is removed, she may claim it as before.* But if the Husband of an Alien sell his Lands, and then she be made a Denizen, she shall not be endow'd: *For an Alien has no more Title of Dower than if she were never married at all, and the Husband's Alienation takes nothing from her which would certainly have come to her by the natural Course of Things, for she only had a Possibility of gaining such Title by K.'s voluntary Act.* But in the same Case, if she were naturalized, she should have had her Dower; *because, thereby she became a natural Subject ab initio.*

On the Issue, *quod nunquam fuere Legitimo Matrimonio copulati*, the Bishop ought to certify that they were *Legitimo Matrimonio copulati*, tho' the Woman were under 12, or the Man under 14, or tho' they might have been divorced *à Vinculo*, for it was *Legitimum quoad dotem*. But it is said, that such Wife who might have been divorced *à Vinculo*, shall not have an Appeal of the Death of her Husband, *in favorem Vitæ*;

D

yet

yet an Adultress that elopes shall have an
 (a) W. 2. 34. Appeal, tho' she shall not have (a) Dower,
 for the Statute that takes away the one,
 mentions not the other; so shall the Wife
 of one attainted of Treason, *for her Husband*
tho' attainted, is still her Husband.

A Wife can't have Dower till her Hus-
 band's natural Death.

As a Woman shall have a 3d Part of the
 Husband's Land for her Dower by Com-
 mon Law, so by Custom of some Places she
 shall have half, or all, &c. She shall have
 half of Gavelkind Lands while she remains
 Sole, and without Child; and such a Cu-
 stom may be in Upland Towns as well as
 Burghs, but it is safer to lay it in a Ma-
 nor, if the Truth will bear it: And Custom
 may abridge, as well enlarge Dower.

34. Dowment, *ad ostium Ecclesiæ*, is where
 one of full Age, when he comes to the
 Church Door to be married, after Affiance
 plighted, endows his Wife of all his Land,
 or half, or less, and assigns the Certainty of
 what she shall have. In this Case she may
 enter after his Death, without other Assign-
 ment. Such Dowment can't be made *ad*
ostium Castri, Messuagii, &c. it must be
 made after Marriage, therefore it is good
 without Deed, *which a Man can't make to*
his Wife; and such Dowments are favoured,
because they supply a necessary Defect of
Law, by reducing the Wife's Title to a 3d
of the Husband's Land to some known cer-
tain Part, which no general Rules can do.

Anciently such Dowment was good for more

more than a 3d Part, but now it may be made for the whole.

Where the Writ demands Land, Rent, or other Things in certain, the Dem't after Judgment may enter, or distrein, before any Seisin delivered by the Sheriff; but in Dower, where the Writ demands nothing in certain, the Dem't can do neither, till after Execution; and tho' the Writ demand the 3d Part of 6d. Rent, or the 3d Part of a Moiety; in which Cases, the Sheriff can reduce it to no more Certainty than was before; yet he must deliver Execution, *that the Solemnity thereof may give the greater Strength to the Judgment so uncertainly delivered.*

As Dower may be assigned by the Sheriff in Pursuance at K.'s Writ, so may it be assigned by the Ten't of the Land by Consent, and to make such Assignment perfect, these Rules must be observed. 1. It must be certain. 2. Of Land whereof she is Dowable, or Rent out of it, for if it be out of other Land, it is no Bar of her Dower. 3. It must be without Condition or Limitation. 4. It must be made by some Ten't of the Land. If a Jointenant assign to the Wife a 3d Part of the Land for her Dower, this shall bind his Companions; and such Assignment by a Dis'sor. shall bind the Dis'see; but if they assign a Rent it shall bind themselves only, for they were not compellable thereunto. A Man infeof's several with Warranty, his Heir endows the Wife of Parcel of Land in full Satisfaction of all the Dower, which she ought to

have in the Land of all the Feoffees; if she bring her Writ of Dower against the Feoffees, the Heir coming in as Vouchee, may plead this Assignment in Bar, but one Feoffee can't plead such Assignment made by another, for a Man can take no Benefit of an Act done between Strangers; but in the first Case, the Heir is bound by the Warranty of his Ancestor, to secure the Land to the Feoffees. If a Woman recover Dower against a Dis's'or coming to the Land by Covin, to which she was Privy, the Dis's'ee shall avoid it; so if Dis's'or's Endowment be prejudicial to the Dis's'ee, as when the elder Son Disseises the Younger, who was infeoff'd by the Father with Warranty, and endows the Wife, the Younger Son shall avoid it, for else he should lose his Warranty, *by Force whereof if he be in Possession, and the Wife demand Dower against him, he shall recover in Value against his elder Brother.* Assignment by Guardian in Socage is void, but Assignment by Guardian in Chivalry was good, for a Writ of Dower lay against him: The Heir himself, before the Entry of Guardian in Chivalry, might assign it.

Dowment *ex assensu Patris*, is when the Father is seised, and his Son and Heir apparent, being marry'd, endows his Wife of a certain Parcel of his Father's Land: In this Case she may enter after the Son's Death, tho' the Father be still alive, or she may have a Writ of Dower for such Dowment.

But

But if the Father, at the Time of such Dowment, had been seised but of a Rev'n on a Freehold, the Dowment had been void, *for if the Son himself had been seised thereof, he could not have endowed his Wife of it.*

It is the Son that doth endow, and the Father doth but assent; but the Dowment is good, tho' the Son be under Age when it is made; but he must be an Heir Apparent, and such a one as always must continue so: Therefore such Dowment can't be *ex assensu Fratris*, or of *Burgh Eng'*, or Gavelkind Land; but Dowment *ex assensu Matris* is good. Some say, that if the Father be attainted after such Dowment, she loses her Dower, for her Husband continues not Heir,

The Father's Assent to such Dowment, ought to be by Deed; because the Land is charg'd thereby with a future Freehold. To a Deed, Ten Things are necessary: 1. Writing. 2. Parchment or Paper. 3. A Person able to contract. 4. By a sufficient Name. 5. A Person able to be contracted with. 6. By a sufficient Name. 7. A Thing to be contracted for. 8. Apt Words. 9. Sealing. 10. Delivery.

To the Delivery of a Deed to the Party, Words are not necessary; therefore if I deliver a Deed to the Party as an Escrow, to be my Deed on certain Conditions, this is an absolute Delivery of it; *for it would create the greatest Confusion, if the Words of a Deed intended to be framed by Advice, and executed with such Solemnity, should be controll'd by*

loose Words not contained in it, the exact Form of which is so easily forgot or mistaken. But I may deliver a Deed to a Stranger as an Escrow, &c. for the Delivery thereof to a Stranger, without Words, is of no Force, and therefore the same Words which make the Delivery effectual, may shew how far it shall be so. As a Deed may be delivered to the Party without any Words, so may it be delivered by Words only, without any Act.

She that enters and agrees to such Dower *ad estium Ecclesiæ*, or *ex assensu*, is concluded to claim her Dower at Common Law, but she may refuse such Dower, and claim her Dower at Common Law.

A Jointure was no Bar of Dower before
 27 H. 8. 10 for a Right or Title to a Freehold can't be barr'd by Acceptance of a collateral Satisfaction. But by that Statute it is a Bar of Dower, if it be made according to the Form of it; and as to that, these Things are to be observed: 1. It must be by the first Limitation to take effect in Possession, (*by a Conveyance at Law*,) or in Profit, (*by Way of Use executed by the Statute*,) presently after the Husband's Death. Therefore if the Limitation be to the Husband for L. after to A. for L. and after to the Wife for L. this can be no Jointure within the Statute, to bar Dower, tho' A. die during the Coverture, for *quod ab initio non valet, tractu Temporis non Convalescet*. 2. It must be an Estate for her L. at least; but it may be limited to continue so long as she shall remain Sole, or shall do, or forbear to do, any Act in her own Power

Power. 3. It must be expressed or averred to be in Satisfaction of her whole Dower: A Will can't be averred to be in Satisfaction of her Dower, unless it be so expressed in the Will. 4. The Estate of the Land must be in her, not in Trustees for her. 5. It may be made before or after Marriage; but if it be made after, the Wife may claim Dower, and waive her Jointure, tho' she join'd with her Husband in levying a Fine of it. It may be limited to her alone, or jointly with her Husband.

A Jointure is not forfeited by the Husband's Attainder of Treason, but Dower by Common Law, or *ad ostium Ecclesiæ*, or *ex assensu*, or by Custom, are barr'd by such Attainder, so long as it stands in Force.

37.

A Jointure, or Dowment, *ad ostium Ecclesiæ*, or *ex assensu*, made to one under the Age of 9 Years, are good, because they are made by Assent.

She that is endowed *ad ostium Ecclesiæ*, or *ex assensu*, may enter into the Land assigned, after her Husband's Death, without any Assignment. Vid. Supra.

A Woman shall not be endowed of Lands whereof her Husband was Jointenant, but of Land whereof he was Ten't in Common she shall.

38.

If Ten't *T.* endow his Wife *ad ostium Ecclesiæ*, the Issue may enter upon her after his Death: And if Ten't in Fee within Age, make such Dowment, his Heir may enter upon her: But Dowment *ex assensu Patris*

is good, tho' the Husband be within Age, the Father being then of full Age.

A Woman Guardian in Socage bringing a Writ of Dower against Guardian by Kt.'s Service (*before* 12 Ca. 2. 24.) should, upon his Pleading the whole Matter, have been adjudged to endow herself *de la plus Beale*, i. e. the Fairest of the Socage Land. But such Dowment could not be without Judgment: If the Socage Land were not sufficient for her whole Dower, she should retain for Part, and recover against the Guardian in Chivalry for the other Part. After Judgment as aforesaid, whether in the K.'s Court, or the Lord's, the Wife should in the Presence of her Neighbours, have endowed herself of the Best of the Land, which she held as Guardian in Socage, by Metes, to hold it for *L.*

Guardian in Chivalry was possess'd of the Ward of the Body before Seisur, but not of the Land before Entry. Writ of Dower lay against K.'s Grantee of a Ward; it also lay against the Executors of the Guardian; or one of them only, if he alone took the Profits. If a Man were possess'd of a Ward in his Wife's Right, the Writ of Dower lay against the Husband only.

39.

Guardian in Chivalry could not plead Detainment of Charters in Bar of Dower, but he might plead Detainment of the Body of the Heir, because the Marriage of the Heir belong'd to him. He might assign Dower out of the Land in Ward, or give a Rent in lieu of it. If he had assigned too much, the Heir at Common Law might have a Writ of *Ad-measurement*

Age, measurement; if the Heir had assigned too much, before the Guardian entered, *W. 2.* gave the Guardian this Writ, and the Heir himself might have the same when he came to Age, some say, within Age; but the Guardian's Assignee after such Endowment could not have it, because it was a Chose in Action.

This Writ also lay on an Assignment of F. N. B. Dower in Chancery to the Widow of K.'s ^{149. a. 264} Ten't in Capite.

Whenever a Wife is seised of such a State in Tenements, that the Issue which the Man has by Her may possibly inherit the same as Heir to her, he shall be Ten't by Curtesy; and if the Man have Issue inheritable by her, and then she be attainted, yet the Title of being Ten't by Curtesy vested in the Husband, shall not be lost thereby; but if she be attainted before Issue had, he can have no Title at all to be Ten't by Curtesy.

So when the Man is seised of such an Estate in Tenements, that it may possibly happen that the Wife may have Issue by him, and that the same Issue may possibly inherit the same Estate as Heir to him, she shall have Dower; tho' the Wife be never so old; or the Husband never so young. But 2d Wife of Donee in special T. shall not be endowed, *Causa Patet.*

After *W. 2.* if the Ten't T. were attainted of Felony, the Issue should inherit, and yet the Wife lost her Dower, for she was not relieved by the Statute; and a Wife that elopes loses her Dower, by the 34th Chap.

Of Ten't for Term of Life

of that Statute, and yet her Issue shall inherit.

The Common Law punish'd one attainted of Treason, or Felony: 1. With Loss of Life, by Hanging. 2. Loss of his Wife's Dower, as well against the Husband's Feoffee, as the Lord by escheat: (but at this Day the Husband's Attainder of Felony causes no Loss of his Wife's Dower.) 3. Corruption of Blood, Loss of Gentility, &c. 4. Forfeiture of Land, Goods, and Chattels. But this extends not to *Petit Larceny*, under 12*d*.

Of Ten't for Term of Life.

TENANT *L.* is he to whom Tenements are let for Term of his *L.* or for Term of another's Life; but in common Speech, the First is call'd Ten't for Term of his Life, the 2*d* is called Tent for Term of another Man's Life. If Lessee *pur autre Vie*, or Grantee of Ten't in Dower, or by Curtesy, or of Lessee for his own Life die, living *cestuique Vie*, he that first enters is called an Occupant and should at Law hold the Land, living *cestuique Vie*, and be punish'd for Waste, and subject to Payment of the Rent reserved. But there never could be an Occupant against the K. nor of a Thing lying in Grant, for every Occupant must not only ~~over~~ the Life of *cestuique Vie*, but must also claim by a *que* Estate; but this cannot be pleaded of Things that lie in Grant, in which no Man can plead that he has the Estate of another, without shewing a Writing by which he claims

claims it. But the Heir of Ten't *pur autre Vie* alone shall have the Land, as a *special Occupant*, where the Lease is to a Man and his Heirs for another's Life, or where Ten't *pur autre Vie*, grants over his Estate to another and his Heirs; and now by 29 Ca. 2. 3 such Estate shall be chargeable in the Hands of the Heir, if it come to him by such special Occupancy, as Assets by Descent; else it shall go to the Executors, and be Assets in their Hands.

Lessee *L.* or *T.* shall have reasonable Plough-bote, Hey-bote, and House-bote, without Provision of the Party, and he may take them on the Land demised without any Assignment, unless he be specially restrained.

If a Lease be made to a Man for his Life and the Lives of *A.* and *B.* he hath but one Freehold with several Limitations, which is higher than a Lease for his own Life only; but when there are several States in several Persons, an Estate for ones own Life is higher than for another's. Therefore Ten't *L.* may surrender to him in Rem'r for Life, and if he infeoff him, it enures by way of Surrender, and is no Forfeiture. If Lessee *L.* lease to his Lessor for Lessor's *L.* or if Feme Lessee *L.* and her Husband by Indenture make a Lease to the Lessor for the Husband's Life, such Leases can't be Forfeitures, because the Lessor is privy to them; nor Surrenders because the Lessees give not up their whole Estate; and if the first Lessor marry, and die, during the Life of Lessee in the first Case, or of the Husband in

in the Second, his Wife shall not be endow-
ed, and if a Rent be reserv'd on such Lease
made to the Lessor, the Reservation is good.
If a Woman recover Dower against the
Lessee *L.* of the Husband's Heir, or against
a Widow of her Husband's Feoffee being
Ten't in Dower, and die, they shall have
the Land again. *A.* and *B.* Jointenants, *A.*
for *L. B.* in Fee, join in a Lease *L. A.* has
a Rev'n, and shall join in an Action of
Waste. So if Lessor and Lessee *L.* join in
such Lease, it is said they shall join in an
Action of Waste, and that the one shall re-
cover the Place wasted, and the other the
Damages.

A Lease made to one *durante Viduitate* or
dum sola fuerit, or *quam diu se bene gesserit*,
or so long as Lessee shall pay 10 *l.* *per Annum*
or till he be promoted to a Benefice, or for
any other uncertain Time, if it be of Lands,
and Livery be made, gives a State *L.* deter-
minable, but if it be of Things that lie in
Grant, it gives a State *L.* by Delivery of the
Deed. And in Count, or Plea, the Lessee
shall alledge the Lease, and conclude, that
by Force thereof he was seised generally for
Term of his Life. If a Manor worth 20 *l.*
per Annum, be Lett to a Man till 100 *l.* be
paid, the Lessee has a State *L.* if Livery be
made, determinable upon the Levying of
the 100 *l.* If a Rent Charge of 20 *l.* *per*
Annum be granted till 100 *l.* be paid, the
Grantee has a State for five Years, for it is
certain, that then it will be paid. Yet
some uncertain Estat esare neither for *L.*
X. or *W.* As where Land is devised to Execu-
tors

tors till such Debts are paid, for if this were a State *L.* the Debts by the Executor's Death might remain unpaid: So where Guardian by *Kt.*'s Service held the Heir's Land for the single Value of the Marriage, (*in which Case he had the Land but in Nature of a Distress;*) or where such Guardian held over for the double Value, or where one has Land delivered in Execution for a Debt, *which Estates are created by Parliament, and if they should be construed to be Estates L. they might determine before the Money, for the Satisfaction whereof they were given, could be levied.*

If a Man grant Lands, or Rev'ns, &c. (due Ceremonies requisite in Law being performed,) or declare an Use, and limit no Estate, the Grantee or Lessee has a State *L.* *K.* grants to an Officer at Will, a Rent for the Exercise of his Office for Term of his *L.* the Grantee has a State in the Rent for Term of Life, determinable at Will *consequentially, because it must determine with the Office, but K. can't take away the Rent, unless he remove him from his Office.* A Lease *L.* made by Ten't in Fee, shall be construed for *L.* of the Lessee, such Lease by Ten't *T.* shall be construed for *L.* of the Lessor, for if it were construed to be for *L.* of the Lessee, it would cause a Discontinuance, and the Law more respects a less Estate by Right, than a greater by Wrong.

He that has a State *L.* or a greater, has a Freehold, but none that has a less Estate. Feoffor is properly he that infeoffs another in

in Fee: Donor is he that makes a Gift in T. Lessor he that Leases for L. Y. or W.

Whoever is disabled to purchase, is disabled to infeoff; but Persons attainted of Treason, Felony, or *Præmunire*, or guilty of such Offences, if Attainders ensue, may purchase, (*for the Benefit of others*,) but their Feoffments are voidable. An Ideot, Madman, Infant, Feme Covert, one under Duress, or born Deaf, Dumb, and Blind, may purchase, and infeoff others, but both their Purchases and Feoffments are voidable; an Heretick convict, Leper removed by Writ, one Deaf, Dumb, or Blind, if he has understanding, and can express it by Signs, Villeins of any, but the K. may infeoff, and their Feoffments shall never be avoided.

At Commonn Law a Man could not make a Feoffment of Parcel to hold of the Chief Lord, for he could not divide the Seigniori which was entire, and bar the Lord of his Distress for the whole Services in any Part of the Land, but he might make a Feoffment of the whole to hold of the Lord, or a Feoffment of Parcel to hold of himself; but such Feoffment of Parcel made without the Lord's Assent after *Magna Charta* 32. (*which provided, quod nullus liber homo det de cætero amplius alicui de terrâ suâ, quam ut de resid' terræ suæ posset sufficienter fieri Domino feodi servitium ei debitum quod pertinet ad feodum illud*,) was holden to be against the said Statute, and the Heir of the Feoffor might avoid it, unless the Services due to the Lord might be sufficiently performed of the Residue remain-

remaining in the Hand of the Feoffor. And by this Statute K. took a Fine of his Ten't for Alienation, and some say that he might have seised the Land as forfeited.

At this Day, by the Statute of *quia emptores*, the Ten't may alien Part to hold of the Lord, and the Feoffee shall hold of him *pro particula*; but this Act took not away K.'s Fine for Alienation, because he was not mention'd in it: By the 1 Ed. 3. 12. it was provided, That the Alienation of K.'s Ten't in Chief should be no Forfeiture, and that K. should only have a Fine; and by 12 Ca. 2. 24. *all Fines for Alienations are taken away, except such as are due by Custom of particular Manors.*

Of Ten't for Term of Years.

TENANT T. is he to whom a Lease for a certain Term of Years is made, who has enter'd by Force of such Lease.

44.

By 32 H. 8. 28. Ten't in Tail, Husband and Wife seised jointly of a State of Inheritance, or in the Wife's Right, any Person seised in the Right of his Church, except Parsons or Vicars, may by Lease for 21 Years, or 3 Lives, bind the Issues in T. (but not him in Rev'n or Rem'r,) the Heirs or Successors respectively; but these Things must be observed in the making of such Lease.

1. It must be by Indenture.
2. It must, by the Words of the Statute, be made to begin from the Day of the making thereof, or it may be made to begin from

(a) Cro.
Ja. 458.

Ycl. 131.

from the making, by an equitable Construction; but if a Lease *L.* be made to begin from the Day of the making, the (a) Livery of Seisin must be made after the Day on which the Deed was delivered, for if it were made on the same Day, it would be void, because a Freehold cannot pass in Futuro, for which Cause a Grant for *L.* of a Thing lying in Grant, habendum a die Confectionis, is void; but such Lease *L.* of Land is good, if Livery be made after the Day on which the Deed was delivered, because it takes not Effect by the Delivery of the Deed, but by Livery of Seisin; but a Grant, of Things lying in Grant, must take Effect by the Delivery of the Deed, or not at all.

3. If there be an old Lease in Being, it must be absolutely surrender'd, or within one Year of its Expiration.

4. There must not be a double Lease in Being at the same Time; therefore, if one make a Lease *T.* according to the Statute, and oust his Lessee, he cannot make a Lease *L.* according to the Statute.

5. It may be for fewer Years or Lives.

6. It must be of Things manurable and corporeal.

(b) Quære,
1 L. v. 312.
1 Sjd. 416.

7. Of Land, &c. most commonly lett to Farm for (b) 20 Years next before, by some seized of a State of Inheritance. A Grant by Copy, is a sufficient letting to Farm within this Statute.

8. The accustomed yearly Rent must be reserved, therefore a Lease of one Acre, not usually lett, together with others, commonly

only lett, reserving a Rent exceeding the former, to the Value of that Acre, is not warranted by the said Statute, as to any Part, because the old Rent is not reserved out of the Land accustomably letten, but a new Rent issuing entirely out of the Whole, and where the Words of the Statute, which impower such Ten'ts to make such Leases, may be strictly observed without any Inconvenience to the Party, they ought to be pursued. Parceners after Partition, may Lease the Land reserving a Rent *pro Ratâ*, for otherwise they could make no Lease, unless all would agree. So Ten't T. may lett Part of the Land accustomably letten, reserving Rent *pro Ratâ*, for perhaps he may not be able to get a Ten't to take the Whole. It is not necessary to reserve a Heriot, or to reserve the Rent at four Feasts, tho' formerly the Leases were so made, for the Words of the Statute only require that the yearly Rent or more be reserved.

9. It must not be without Impeachment of Waste, therefore a Lease *L.* with a Rem'r for *L.* is not within this Statute.

All Conveyances whatsoever made by Ecclesiastical Corporations are made void by *El.* 19. and 13 *El.* 10. except Leases for 3 Lives, or 21 Years from the Time of the making, whereon the old yearly Rent, or more, is reserved.

The same Rules must be observ'd in making Leases within the Exceptions of the said Statutes, as are required in Leases made according

according to the 32 H. 8. except in two Cases.

1. Leases within the Exception of those Statutes must be made to begin from the Making, and not from the Day of the Making, *which would last a Day longer than the Statute allows, and if a Lease one Day longer be good, why not two, and so on*

Vide

3 Lev. 438.

2. The 32 H. 8. does not enable the Persons therein mentioned to make a Concurrent Lease, when there is an old Lease in Being of a Year's Continuance, but no Concurrent Lease is restrained by the 1st or 13th of El. so that it be made to commence from the Making; but 14 El. 11. enacts, *That the 13 El. 2. shall not extend to Houses in Cities and Towns, but that the same may be granted as they might have been before the 13 El. (even in Fee, so that a full Rent compence be made of as good Value,) and Leases may be made of Houses for 40 Years, charging the Lessee with Repairs, &c. Provided that no Lease be permitted to be made by Force of the said Act in Rev'n, but this Act mentions only Persons restrained by the 13th El. Therefore it (a) extends not to Bishops who are restrained by the 1st only, and are not within the 13th. 18 El. 10. enacts, That all Leases by Persons restrained by the 13th shall be void, where Rev'n of any former Lease is in Being, and not to be surrender'd, expired or ended within 10 Years after the Making of the new Lease. But it seems, that concurrent Leases of Houses in Towns, which are prohibited by*

(a) Was
330.

the 14th El. are (a) not made good by this Statute, for it only mentions Persons re-
strain'd by the 13th, but the Restraint thereof is wholly set loose by the 14th El. as of the 20 such Houses, and the 18th is wholly a disabling Statute: And concurrent Leases made by Bishops remain as they were before the said Statutes, therefore if they are confirmed by Dean and Chapter they are good, tho' there are more than 3 Years in Being of an old Lease, but if they are not confirmed, they must follow the Directions of 32 H. 8. By 18 El. all Leases by Colleges and collegiate Churches are void, unless one 3d of the old Rent be reserved in Corn at the Rate of a Quarter of Wheat for every 6 s. 8 d. and a Quarter of Malt for every 5 s. of the old Rent.

Notwithstanding 13 El. says, that all other Grants, &c. shall be void to all Purposes; yet if they be made by a sole Corporation, they shall be good against the Lessor, if by a Corporation Aggregate, they shall be good so long as the same Person continues Head. Nor do the said Acts extend to Grants of ancient Offices of Necessity granted with the usual Fees. But if they have been usually granted for one Life only, a Grant thereof for more Lives, or in Rev'n, is not good; but if they have been usually granted in Rev'n, they may be still so granted, that the Office may be always full.

Ten't of the Land and a Stranger join in Lease T. by Indenture, this is the Lease of the Ten't only, and the Confirmation of the Stranger, and as to him it works only by

(a) Wats 344. Q.

10 Rep. 6

Cro. Ca. 557.

by Conclusion. Two several Ten'ts of several Lands join in such a Lease, it shall enure as the several Lease and Confirmation of both, and shall work no Conclusion because an Interest passes from both. *B.* Lessee for *C.*'s Life, and he in Rem'r join in such Lease, it is the Lease of *B.* while *C.* lives, and after his Death, it is the Lease of the other, and the Confirmation of *B.* and so it must be pleaded, for if the Lessee be ejected, and bring an Ejectment, and declare of a Lease by both, and upon not Guilty pleaded, it be found specially, it shall be adjudg'd against him, *for tho' the Words of such Deed be the joint Expressions of both, yet it is so far only the Lease of either of them, as the Lessee derives his Possession from theirs;* but such a Lease works no Conclusion, *causa quæ supra* Ten't *T.* and he in Rem'r grant a Rent Charge, Ten't *T.* dies without Issue, Grantee may avow by Force of a Grant by him in Rem'r.

A Lease *T.* by one 15 Years old is voidable at Common Law, but it may be good by Custom; a Lease *T.* by Bishop or Ten't *T.* not within 32 *H.* 8. is voidable by the Successor or Issue. A Lease *T.* by Ten't *T.* tho' it be within the Statute, is void as to him in Rev'n or Rem'r. A Lease *T.* by Parson, or Vicar, is void as to the Successor, a Lease *L.* is voidable: So a Lease *T.* by a Prebend, or Archdeacon, (*not made according to the 32d H. 8.*) is void as to the Successor, and a Lease *L.* is voidable.

Vide
Wals 326.

Terminat

Terminus signifies not only the Limits of Time, but also the State that passes for that Time. As if Lessor for 20 Years make a Lease to begin after the Expiration, *prædicti Termini viginti annorum*, it shall commence on a Forfeiture, or Surrender of the first Lease, but if it had been made to begin *post finem viginti annorum prædicti*, it should not commence till the 20 Years were expired.

Proper Words to make a Lease, are to grant, demise, to farm lett, betake, and whatever Words amount to a Grant, as *committo*, &c.

Every Lease *T.* when it is to take Effect in Interest or Possession, must have a certain Beginning and a certain End, therefore a Lease for so many Years as *J. S.* shall live is void, *ab initio*: But it may be limited to take Effect upon an uncertain Contingent, as when *T. S.* shall pay 20*l.* and it may be made certain by Reference to a Certainty, as for so many Years as *J. S.* has in the Manor of *D.* A Lease by Parson for 3 Years, and so from 3 Years to 3 Years, so long as he shall be Parson, is good for 6 Years, if he continue Parson so long, for so much only is certain, the rest uncertain and void. A Lease for so many Years as *J. S.* shall name, is uncertain at first, but good when he has named them: A Lease for 21 Years, if *J. S.* live so long, is a good Lease for 21 Years, determinable on the Death of *J. S.* for there is a certain Period fix'd, beyond which it cannot last, tho' it may determine sooner.

Vid. 1 Rol.
Ab. 850.

For

46.

For many Respects, Leases at Common Law could not be made for above 40 Years, and it was the better Opinion, that no Lessee *T.* could falsify a covenous Recovery of the Freehold; but the Statute of *Glouc.* gives Power to Lessee *T.* if the Lease were by Writing, to be received upon Default of the Freeholder, and to try whether the Plea were moved by Collusion; but this gave Remedy in no other Case, nor to Ten't by Execution, but by 21 *H.* 8. 15. all Tenants *T.* and Ten'ts by Executors, may falsify all Manner of Recoveries on feigned Titles; but neither of the said Acts gives any Remedy to a Guardian.

Parcener makes a Lease *T.* and after makes Partition by Consent, and has too little allotted to her, the Lessee may enter into so much of the other's Land as will make his Part equal; but if Partition were made by the Sheriff, it should have bound the Lessee.

Ten't *T.* makes a Lease *T.* marries and dies without Issue, the Lease is void as to him in Rev'n, but it shall be good against the Wife when endowed, *for her Estate is derived out of the Estate T. under which the Lessee T. claims by a Title prior to hers.* So if a Son be born, it shall be voidable or good as to him, according as it agrees with the Statute, tho' it be void as to him in Rev'n. If *K.* had made a Gift in *T.* to hold by *Kr's* Service, and Donee had made a Lease for 30 *T.* and died, and the *K.* in Right of the Heir, during his Wardship, or primer Seisin, had avoided the Lease,

yet

yet the Issue afterwards might have affirm'd or avoided it at his Election. So notwithstanding Ten't in Dower avoids for her Life a Lease *T.* made after the Coverture, it shall be in Force after her Death.

But if a Patron grant the next Avoidance, and then Parson, Patron, and Ordinary make a Lease *T.* of the Glebe, the Parson dies, and the Grantees Clerk is inducted, the Lease shall never revive, because it was avoided by one who had the whole Estate of the Glebe in him; so where Husband avoids a Fine levy'd by the Wife, it shall not bind her after his Death; so where a Woman is endowed of an Advowson, which is appropriated, and presents, and her Clerk is inducted, and dies, the Appropriation is dissolved, because the Incumbent that came in by Presentation had the whole Estate in him, *and the Fee being once discharged, cannot be charged again without a new Grant.* Ten't *T.* makes a future Lease, and dies, his Issue infeoffs *A.* the Term commences, *A.* shall have the same Election that the Issue had, to affirm or avoid the Lease.

Lessee *T.* before he enters has an Interest, (called in Latin, *interesse Termini*,) which is grantable over, and shall go to Executors, &c. and shall remain good, tho' the Lessor die before the Lessee enters. A Release to such Lessee by the Lessor shall discharge the Rent reserved, but cannot encrease his Estate: Nor can the Lessor pass the Rev'n by the Name of the Rev'n before the Lessee enters. If two have such a joint Interest, and

and one die, it shall survive to the other.

Vid. Supra.
18.

The Husband may dispose of a Term that he has in his Wife's Right: If he do not, the Survivor of them shall have it. If Husband make a Lease for Part of the Term, and die, the Wife shall have so much of the Term as he disposed not of, and the Executors of the Husband shall have the Rent reserved; not the Wife, *for she claims not under the Lessor*. If he grant the whole on Condition, and die, and his Executors enter for the Condition broken, they shall have the Term. *For the Husband having disposed of the Whole, the Wife had no manner of Right to it left in her: But in the Case above, where the Heir of the Part of the Father enters for a Condition broken by the Fecoffee of his Ancestor, who was seised as Heir of the Part of the Mother, the Heir of the Part of the Mother shall enter upon him, for the Heir of the Part of the Father can't possibly hold those Lands as Heir, because he is not of the Blood of the first Purchaser.* A Lease is made to Husband and Wife for *L.* Rem'r to the Executors of the Survivor for *T.* this is not in the Disposal of the Husband, because it is but a Possibility. Husband and Wife are ejected, Husband brings Ejectment in his own Name, and recovers: This vests the whole Term in him.

Lease *T.* made to *J. S.* and his Heirs, or to a sole Corporation and his Successors, shall go to Executors.

A Lease *T.* having no Beginning limited, or limited to begin from the making, or from

from henceforth, or from a Date impossible as the 30th of *February*, or from the End of a former Lease, either void, or misrecited in a Point material, shall begin on the Day of Delivery. A Lease *T.* limited from the Date, or the Day of the (a) Date, shall begin the Day after the Date, but if it be a *die Confectionis*, it shall begin the Day after the Delivery.

(a) Vid.
3 Lev. 438.

47.

If one make a Lease *T.* of Land, or of the Herbage, or Vesture of Land, or any other Tenement manurable and corporeal, he may distrein for it, or have an Action of Debt; and if one make such Lease of a Rev'n or Rem'r of such Tenements, he may distrein, &c. for the Rent reserved, when the Possession comes to the Lessee by Force of such Lease. But none, except *K.* can reserve a Rent out of incorporeal Inheritances, to which no Recourse can be had for a Distress, as Fairs, Tythes, &c. yet if a Subject doth reserve a Rent on a Lease *T.* of such Inheritances, he may have an Action of Debt for it by way of Contract, but can't distrein: but if the Lease were for Life, and there had been no Covenant on the Part of the Lessee to pay it, the Lessor had no Remedy at Law; not an Action of Debt, because it was reserv'd for Life, nor a real or mix'd Action because it is but a Sum in gross; Sed Q. If he be not reliev'd by 8th of Qu. A. which gives an Action of Debt for Rent, reserv'd on any Lease *L.*

There is a Difference betwixt the Words Reservation, and Exception, the first is Proper, where some new Thing, not in

E

Esse

Esse before, is to be rendred to the Lessor, &c. the Second is where Part of the Thing granted is saved to the Grantor; proper Words of the First, are *reservando, reddendo, solvendo, inveniundo, dummodo*, and the like; the Words *exceptis, Præter, &c.* are proper for the Second; out of a General, a Part may be excepted, as out of a Manor one Acre, but not a Part out of a Certainty, as where 20 Acres are demised, excepting one, *for such an Exception is repugnant.*

Rent can be reserv'd to none but the Lessor: If two Jointenants make a Lease, reserving a Rent to one of them, it shall go to both, unless it be by Indenture, in which Case it shall enure to one alone, by Way of Conclusion. Rent generally reserv'd by Ten't in Fee, goes to him and his Heirs, *by Implication of Law*, as incident to the Rev'n; but if it be reserved to the Lessor, or to him and his Assigns, or to him and his Executors, it determines by his Death, *for Expressum facit cessare Tacitum*: But it has been (a) resolved, that a Rent reserv'd to the Lessor and his Executors and Assigns, during the Term, shall go to the Heir.

Dogs, Coneys, &c. cannot be distrained for Rent, because no one can have a valuable Property in them, and an Ax in a Man's Hand cutting Wood, or an Horse, which a Man is riding on, are privileg'd for the Time. (b) But it seems that Horses drawing a Cart may be distrain'd for Rent, and if a Man riding on a Horse be Damage-Fesant, the Horse may be led to the Pound with the

(a) 1 Ven.

361.

2 Lev. 13.

(b) 1 Sid.

442, 440.

the Man upon him. Cloth in a Taylor's Shop, &c. cannot be distrain'd, because it is there for the Maintenance of Trade. Nor loose Shocks, because they cannot be restored in the same Plight; (but if they be in a Cart, or Damage Feasant, they may be distrain'd.) And now by the 2d Gul. & Mar. 5. Corn in Sheaves or Cocks, or loose, or in the Straw, or Hay lying in a Barn, or upon a Hovel, or Rick, may be seisd, secur'd, and lock'd up till replevied, so as it be not remov'd to the Damage of the Owner, and by the said Statute, if the Ten't doth not replevy his Goods taken, within 5 Days, they shall be appraised by two sworn Appraisers, and sold. By the 8th of Q. A. No Goods being in any Tenement leas'd for Life, Y. or W. shall be taken by Vertue of an Execution, at the Suit of a Subject, unless the Plaintiff shall pay the Landlord the Arrears due for Rent for such Tenement, but it is sufficient to pay one Year's Rent, tho' more be due.

Beasts of the Plough, or the Utensils of a Man's Trade or Profession, cannot be distrain'd, if other Beasts or Goods may be found; nor Things fixed to a Freehold.

A Stranger's Beasts that escape into the Land may be distrain'd for Rent, tho' they have not been Levant and Couchant. But ^{2 Lut. 1530.} it seems that this is to be understood where the Beasts that escape are Trespassers; for it is otherwise, where the Ten't of the Land is in Default in not repairing his Fences, by Reason whereof the Beasts come upon the Land; for in this Case, the Lessor cannot

distrain such Beasts, tho' they have been Levant and Couchant, unless he give Notice to the Owner, who suffers them to continue there afterwards, for the Lessor is in Fault in not binding his Lessee to repair the Fences; but the Lord of the Fee, or Grantee of a Rent-Charge, in such Case may distrain such Beasts after they have been Levant and Couchant, without giving Notice, for he is no Way to blame for the Want of repairing the Fences.

He that distrains Things having Life, must put them in a Pound overt, within 3 Miles in the same County, either in his own Close, or in another's, and the Owner must sustain them, and shall be no Trespasser for so doing; if the Pound be covert, the Distrainer must sustain them at his own Cost. He that distrains Goods, must put them in a Pound covert within 3 Miles in the same County: If he put them in a Pound open, he must answer for them if stol'n, or damag'd.

He whose Goods are unlawfully distrained, may rescue them before they are impounded, not after, for then they are in Custody of Law.

Commoner making fresh Suit, may take his Goods, distrain'd for Damage Feasant, out of a Pound unlock'd; but if he take them out of a Pound lock'd, a Writ of *Parco fracto* lies against him, and he that distrain'd, may take them again wherever he finds them. Rent due the last Day of the Term was not distrainable, because the Term was ended; but now by the 8th Qu. A. any
Lessor

Lessor may distrain for Arrears of Rent after the Lease is determined, provided the distress be made within 6 Months, and during Lessor's Title, and Ten'ts Possession.

The Lessor (a) each Year may have Debt for the yearly Rent; but if one not seisd of Tenements make a Lease by Deed-Poll, or Parol, and bring Debt for the Rent reserv'd the Lessee may plead that the Lessor had nothing in the Tenements at the Time of the Lease: Or he may plead *Non dimisit*, and give in Evidence the special Matter, (*for it is not bare using of the Words Lease, Demise, &c. that makes a Lease, but the Transferring of an Interest to the Lessee*; but if the Lease were by Indenture, he could not plead this Plea, for an Indenture concludes both Parties. If B. Lessee for C.'s Life make Lease T. and purchase the Rev'n, and C. die, B. may confess and avoid notwithstanding the Indenture, for an Interest pass'd by it, and therefore it works no Estoppel, as it would have done, if B. had had nothing in the Land. If one take a Lease of his own Land by Indenture, rendring Rent, he shall be estopp'd; but if it were only of the Herbage, he might say that the Lessor had nothing in the Land; *for tho' a Man be estopp'd to affirm the Truth, when it is directly contrary to what he has expressly acknowledged by his own Deed; not so when it may be only prov'd to be contrary by Argument, let the Consequence be ever so plain.* After the Lease taken by one of his own Land is ended, the Estoppel determines: *For the sole Intent of the Indenture is mutually to bind each*

(a) Vid.
Co. L. 162.
b. 292. b.

Party to fulfill the Agreement therein contained during the Term, which being determin'd, they have had the full Effect which was design'd.

48.

At Common Law, any Estate of Freehold in Land might pass by Livery of Seisin without Deed, and Leases *x.* of Land were good without either Livery of Seisin, or Deed. But now by 29 Ca. 2. 3. all Leases, Estates, Interests of Freehold, or Terms of Years, of Hereditaments, not put in Writing, and sign'd by the Parties making them, or their Agents authoriz'd by Writing, shall have no greater Effect than as Estates at Will, except Leases not exceeding three Years, whereof the Rent shall be two Thirds of the full Value. And all Assignments, Grants, or Surrenders of such Estates, not being Copyholds, must be by Deed, signed, ut supra, or by Operation of Law: And all Declarations or Creations of Trust must be by Writing sign'd by the Party, or by his last Will by Writing, excepting Trusts, resulting by Implication of Law, or transferr'd or extinguish'd by Act of Law.

Vid. infra,
85.

Lessee *x.* may enter by Force of the Lease without Livery of Seisin; but regularly no Freehold can pass without it. Therefore if *A.* being in his House say to *B.* I demise to you this House for Life, this gave no Freehold before the Statute without Livery, nor since the Statute with Livery.

Livery of Seisin is a solemn Delivery of the Possession, and is Twofold. 1. In Deed. 2. In Law. Livery in Deed is when the Feoffor and Feoffee being both on the Land, the

the Feoffor delivers to the Feoffee a Turf of the Land, or a Ring of Gold, or any other Thing not concerning the Land, with such like Words; 'Here I deliver you Seisin and Possession in the Name of all the Tenements contained in the Deed of Feoffment, &c.' And it seems that it may be well made by Words only without any solemn Act, as when the Feoffor says to the Feoffee, 'Enter into this House, and enjoy the same according to the Form of the Deed, &c.' but the bare Delivery of the Deed on the Land shall only have the Operation to make it take Effect as a Deed, and shall not amount to Livery of Seisin, unless it be deliver'd in the Name of Seisin of all the Land, &c.

Contr. Cro.
Ja 80.

Livery in Law, is when the Feoffor and Feoffee being in View of the Land, the Feoffor, *after Delivery of the Deed*, says to the Feoffee, 'Go enter into the Land, and take Possession thereof according to the Form of this Deed, &c.' Such Livery is good if the Feoffee enter, tho' the Land lie in another County; (*and before 29 Ca. 2. 3. Livery in Law passed the Fee without any Deed;*) but if either of the Parties die before the Feoffee enters, the Livery is void, for it passes no Freehold in Deed, or in Law, before Entry; *and by the Death of the Feoffor, the Land belongs to some other, and the Feoffee cannot enter without divesting his Estate; by the Death of the Feoffee there is no Purchaser remaining to take the Estate; and the Heir shall never take by Purchase, where the Word Heir is not used to*

Litt. Sec. 662

Co. Litt. 50.
b.

describe a Purchaser, but only to limit the Estate design'd to pass. Yet if the Feoffee claim the Land as near as he dares, for fear of Death, or Battery, such Entry in Law shall execute the Livery in Law.

A. makes a Deed of Feoffment of divers Parcels of Land to divers Men jointly, and makes Livery of one Parcel to one Feoffee according to the Deed, this passes all and to all. *A.* makes a Charter in Fee, and makes Livery, *secundum formam Charte*, for Life, yet the Fee shall pass, for Livery is not only made for Life, but also according to the Form of the Deed, i. e. according to the Quantity and Quality of the Estate contain'd in the Deed, which necessarily includes a State *L.* (a) But where the Deed and the Words used in the Livery are inconsistent, nothing passes by the Deed.

(a) Litt.
Sec. 159.

Vid. Sup. a,
6+

A. makes a Lease *T.* by Deed, or gives Land by Deed to *B.* to hold to him and his Heirs after the Death of *A.* Livery of Seisin made according to the Form of either Deed (whether before or since 29 Car. 2. 3.) is void, for the first Deed expressly gives a Chattel only, and the second gives a Freehold in Futuro, and consequently is void: And where the sole Purport of the Livery is to make the Estate contain'd in the Deed effectual, it shall rather be void, than strain'd to give a Freehold in the first Case, or a present Estate in the second, against the manifest Intent of the Parties.

Not only fix'd and immoveable, but moveable Inheritances also may pass by Livery: As where 13 Acres, lying in a Mes-

dow

dow of 80, are by Custom yearly set out to a Man, sometimes in one Part, sometimes in another; if they be Parcel of a Manor, they shall pass by the Name of the Manor; if they be in Gross, the Deed must be of the 13 Acres lying in the Meadow, without describing any in Certainty: And by Livery of the 13 Acres allotted to the Feoffor for that Year, all his Interest shall pass. When one Manor is divided betwixt Parceners, so that one shall have it one Year, and the other the next, &c. without Question Livery must be made of that: Where two Manors are divided betwixt them *alternis vicibus* for ever, a Deed of Feoffment must be made of both, and Livery must be of one of them one Year, and of the other the next.

One may have an Inheritance in an upper Chamber, and pass it by Livery.

Dissee makes a Deed of Feoffment, delivers it, and by Attorney enters and gives Seisin; this is good, for the Deed of Feoffment hath its whole Operation from the Livery of Seisin, and the Feoffor is in Possession when that is made according to the Deed. But if Dissee make a Lease T. and deliver it, and then deliver it again upon the Ground, yet nothing passes to the Lessee for a Lease T. must take its Effect by the Delivery of the Deed, or not at all, but at the Time of Delivery he was out of Possession, and the second Delivery of a Deed is void. But if the Deed had been delivered to a Stranger, as an Escrow, to be delivered as his Deed on the Land, it had been good.

Lessor T. of several Closes in one County, makes Livery of them, the Lessee or his Wife, or Servants being then in the House, or on Part of the Land, this is void, for the Possession continuing in the Lessee, no Livery can be made of it; but if his Cattle only had been there, the Livery had been good.

49. Where a Man has two Ways of passing Land, both at Common Law, and intends to pass it by one of them, *and it cannot pass by the Way he intends*, it shall pass by the other, *if there be sufficient Words*. As if A. seisd of two Acres, make a Lease T. of one of them, and after, intending to pass them both by Feoffment, make a Deed of Feoffment, and give Livery in the Acre in Possession, in the Name of both, the Acre in Possession only passes by the Livery; yet if the Lessee attorn, (*which was necessary before 4 & 5 Annæ 16.*) the other shall pass by Way of Grant of a Rev'n and Attorment, for this Way of Conveyance is by Common Law, as well as the other. But where one intends to pass Land by Conveyance at Common Law, and it cannot pass that Way, the Law will not raise a Statute by Way of Use by Force of the Statute; as if a Father make a Charter of Feoffment to his Son, and a Letter of Attorney to deliver Seisin, and no Seisin be delivered, the Law will not raise an Use to the Son, *by construing the Charter as a Covenant to stand seised to the Use of the Son in Consideration of natural Affection*; For the Father expressly design'd that it should enure by Way of

of Feoffment, by Force of which Convey-
 ance, the Law would adjudge the Son to
 be in the Land by the Father, which is
 call'd in the Per, whereas by the other he
 is rather esteem'd to come after him, than
 by him, which is call'd in the Post; and
 also if it should enure by Way of Covenant to
 stand seis'd, it would pass the whole Estate
 immediately, and consequently the Livery of
 Seisin could take no Effect. But latter Au-
 thorities are contrary to my Lord Coke, as
 to this Point, because the Principal Intent
 of the Deed is to pass an Estate to the Son,
 and it shall not be frustrated by adhering too
 strictly to the Form of the Conveyance, if
 by any Construction it can be made effectual.
 Yet it has been resolv'd that a Covenant to
 levy a Fine, which shall be to such and such
 Uses, doth not amount to a Covenant
 to stand seis'd, because then the Party
 could not levy the Fine: But in this
 Case, the Words of the Deed do not purport
 the Grant of an Estate passing immedi-
 ately, as they do in the Case above.

3 Lev. 9, 10.

213.

3 Lev. 371.

3 Lev. 126.

306.

A House or Land belonging to an Office,
 or Chamber belonging to a Corody, pass by
 Deed without Livery by the Grant of the
 Office, or Corody.

A. makes Lease T. Rem'r for L. T. or Fee,
 and makes Livery to Lessee T. this passes
 the Freehold to him in Rem'r; but if Les-
 see T. enter before Livery made to him,
 the Freehold rests in the Lessor, for Livery
 is void when made to one in Possession be-
 fore. A. makes a Lease T. to B. and C.
 without Deed, (before 29 Car. 2. 3.) Rem'r

to *D.* and makes Livery to *B.* in *C.*'s Absence in the Name of both, this vests the Rem'r in *D.* for the Law intends that there is such a mutual Trust between those that take a joint Estate, that the Act of either of them is effectual for himself and the other especially where 'tis not prejudicial to him; but when two Attornies have a bare Authority to receive Livery jointly, if it be made to one in the other's Absence, *secundum firmam Chartæ*, it is void. For they being Strangers to the Land, and their Authority depending wholly upon the Letter of Attorney, their Acting is no further of Force than that is pursued.

A. intending to infeoff *B.* and *C.* without Deed, makes Livery to *B.* in *C.*'s Absence, in the Name of both, this is void as to *C.* (whether made before or since 29 Car. 2. 3.) for no one in his Absence can take or give a Freehold by Livery, but by Attorney warranted by Deed; yet one may take a Freehold by Way of Rem'r, by Livery made to another, in his Absence, as in the Case above of a Lease T. Rem'r in Fee. And if a Deed of Feoffment be made to two, Livery to one in the Name of both is good.

Tho' a Deed may be delivered without Words, yet Livery of Seisin cannot be made without Words.

A. makes Lease T. to *B.* Rem'r in Fee to *C.* and makes Livery to the Lessee without View; this is void, for none can take by Force of such Livery, but he that takes the Freehold himself.

When Lessor and Lessee come upon the

Ground on Purpose for the Lessor to make, and the Lessee to take Livery, such Entry vests no Possession in the Lessee before Livery, for if it should, the Livery would be void. So when Dis'see enters to deliver a Release to the Dis'sor upon the Land by Agreement, this Entry for such Purpose avoids not the Dis'sin: For *affectio tua nomen imponit operi tuo*. But if the Dis'sor infeoff the Dis'see and others, yet the Dis'see is remitted to the Whole; *for while his Entry continues lawful, he cannot receive an Estate from the Dis'sor.*

Lit. Sect.
693.

If a Feoffment be made by Deed, (or without, before 29 Car. 2. 3.) of divers Lands in divers Towns in the same County, Livery of one Parcel in the Name of all passes all. But if the Lands lie in several Counties, there must be Livery made in each County.

When *A.* grants Land to *B.* in Exchange for the Land which *B.* has, and *B.* grants his Land to *A.* in Exchange for the Land which *A.* has, each may enter into the other's Lands, so put in Exchange, without Livery of Seisin. A Freehold likewise passes without it, by Devise, Surrender, Release or Confirmation to Lessee *T.* or *W.* or a Fine which is a Feoffment of Record. At Common Law an Exchange was good without Deed where the Lands lay in the same County; where they lay in divers, it was not. But Things lying in Grant could never be exchange'd without Deed indented.

Things exchange'd need not be *in Esse*, before the Exchange made, for a new Rent may

may be granted out of Land, in Exchange for Land. Nor is Transmutation of Possession requir'd, for a Right to Land, or Rent, may be releas'd in Exchange for Land. And the Things exchang'd, need not be of the same Nature, so they concern Lands or Tenements, as Rent may be exchang'd, for Land; Tithes, or Tenure by Divine Service for Things Temporal: But Land cannot be exchang'd for an Annuity.

51.

In Exchange, the Estates mutually given in Exchange must be equal in Quantity, for if a Fee-simple be exchang'd for a Fee T. or a Tail general for a Tail special, &c. the Exchange is void. But the Quality of Estate needs not to be the same; *therefore*, two Men may give Land to two others jointly, and the other in Exchange give to them in Common; or they may give a sole Estate, and receive a joint one. So a Subject may exchange Land with K. tho' K. be seis'd of the Land exchanged in his polittick Capacity, and the Subject in his natural. Nor is it necessary that the Parties to the Exchange have an equal Estate when they make it, for if Ten't T. or Husband seis'd in the Wife's Right make an Exchange, and give and take a Fee, it is good, till avoided by Wife, or Issue.

This Word, *Excambium*, Exchange, is absolutely necessary.

Vid. supra.
78.

It must be executed by Entry in the Life of both Parties, for no Freehold passes in Deed or Law before Entry, and therefore if either of the Parties die before Entry, the Exchange is void. But it is not necessary that

that the Things given or taken in Exchange should be equal in Value, for the Ceremonies required for the Solemnity of a Conveyance being observed, the Law examines not into the Sufficiency of the Consideration. An Infant exchanges Land, and at full Age occupies the Land taken in Exchange, this binds him, because it was not void, but voidable.

Lessor *T.* dies before the Lessee enters, yet may he enter, for by the Lease he has a Right presently to have the Land according to the Form of the Lease, and the Term being vested, the Lessor's Death cannot divest it. But if *A.* make a Deed of Feoffment, and a Letter of Attorney to deliver Seisin, and die, this avails nothing, for the other has no Right to have the Tenancy according to the Deed before Livery, and by the Death of the Feoffor, the Lands belong to some other; but if a Corporation aggregate make a Deed of Feoffment, and a Letter of Attorney to deliver Seisin, the Livery is good after the Death of the Head, because the Body Politick remains.

Vid. supra,
78.

An Attorney is one set in the Place of another; and is either Publick, as an Attorney at Law, whose Warrant is, *Talis ponit loco suo talem Attornatum suum*; or Private, as those authoris'd to deliver Seisin, which must be warranted by Deed; *Litteræ Acquistancie* signifies a Deed of Acquittance, so a Letter of Attorney signifies a Warrant of Attorney by Deed.

52.

Infants, Monks, Persons attainted, Excommunicate, Villeins, &c. may be Attornies to deliver Seisin. A Wife, as Attorney

to another, may deliver Seisin to her Husband; so may Husband to Wife, or he in Rem'r to the Lessee *L.*

If an Attorney pursue not his Warrant, what he does is of no Force. But if *A.* feis'd of *B.* Acre and *W.* Acre make a Deed of Feoffment of both, and a Letter of Attorney to enter into both, and make Livery of both, the Attorney enters into one, and makes Livery *secundum formam Chartæ*; this is good, tho' he enters not in the Name of both, for it is Tantamount. So if the Deed be to two, and a Letter of Attorney to deliver Seisin to both, and he deliver Livery to one only *secundum formam Chartæ*; this is good, tho' the absent Feoffee may waive it, for the Attorney pursued the Substance of his Warrant.

Perk. 200.
Q.

Lessee *L.* makes a Deed of Feoffment, and a Letter of Attorney to the Lessor to make Livery, and he makes it accordingly, yet he may enter for the Forfeiture. But if Lessee *T.* make a Deed of Feoffment, and a Letter of Attorney to the Lessor to make Livery, and he do it accordingly, this Livery shall bind the Lessor; *for the Lessee had no Freehold whereon the Livery could enure; but in the first Case, the Lessee had an Estate which might pass by Livery, and the Lessor who was not privy to the Deed, might presume that it contain'd no greater Estate than the Lessee could lawfully make.* But when Lessee *T.* makes Livery as Attorney to the Lessor, the Freehold passes from the Lessor, and the Term is not drown'd. *For the sole Intent of the Parties is to pass the Freehold*

Freehold to the Feeffee, nor shall the Lessee's Consent that the Lessor shall pass the Freehold which he lawfully may pass, be construed as a Surrender of his Term.

If one as Procurator to another present to his own Benefice, he puts himself out of Possession, because the Presentee comes in by the Institution of the Ordinary, who is intended, as an indifferent Judge, to admit the rightful Patron's Clerk. If the Lord sell his Ten't's Land by Force of the Ten't's Will, yet the Seigniori remains. But if *Cestuy que use* after 1 R. 3. had been Grantee of a Rent, and had made a Feoffment, the Rent had been extinct, tho' the Land had pass'd from the Feoffees, for he acted not by a bare Authority derived from them, but his Conveyance was made good by the Statute, in Respect of that inherent equitable Right which he had to the Land.

Dis'ee of two Acres makes a Deed of Feoffment, and a Warrant of Attorney to enter into both, and to make Livery *secundum formam Chartæ*, the Attorney enters into one only, and makes Livery, *secundum formam Chartæ*, the Livery is void, because the whole Warrant is not pursued, for the Estate of the Dis'or in the other Acre cannot be divested without Entry, and what an Attorney does is no farther valid than as he acts as such; but when he takes upon him to alter or diminish the Grant of him that impowers him, his Acts are void. But a Custom to grant Copyhold Lands in Fee, implies a Power to grant for L. Rem'r in Fee, for the Lord hath this Power in Respect of his own Interest,

Interest, not as a Substitute to another, & omne majus continet in se minus. Lessor L. makes a Deed of Feoffment, and a Letter of Attorney to deliver Seisin, the Attorney enters on the Lessee, and delivers Seisin; this is sufficient to convey the Rev'n, for the whole Warrant is pursued, and without doubt, if the Lessor had done the same in his own Person, the Rev'n would have pass'd.

A Letter of Attorney may be contained in a Deed of Feoffment, beginning *Omnibus Christi, &c.* But not in an Indenture, unless the Attorney be made a Party. (a) Q.

(a) 2 Roll.
Abr. 8, 9.

As an Attorney must pursue the Authority express'd in the Warrant, so must he observe the Authority implied in Law, viz. That the Livery be made on the Land, for if it be made within View only it is void.

52.

Prohibition to forbid Ten't in Dower, or Curtesy, or Guardian in Chivalry to do Waste, lay at Common Law; but Lessor L. or T. could have no Action of Waste against Lessee, before the Statute of *Glocest. cap. 5.* because it was esteem'd his Folly that he did not provide against it by Covenant. But now by the said Statute, Waste lies against the Ten'ts aforesaid, tho' the Lease be but for half a Year. But the Writ must be general, *quod tenet ad Terminum annorum*, for there is no other Writ, and the Count must be special: And yet the Words of the Statute are *Tenant for Term of Years*, and the Statute is Penal, which ought to be strictly construed; but tho' Cases of like Nature, which cannot be brought within the Words, shall not by Equity be subject to the Penalty of a Statute,

Statute, yet where they are comprehended within the Meaning of the very Words, it is otherwise; thus the Statute which makes it High Treason to kill K. or Petty Treason to kill a Master, are extended to the killing of the Queen Regnant, or of a Mistress, because those Words are meant of any to whom we stand related as Subjects, or Servants; so in this Case the Words Tenant for Years, signify any one that has a determinate Estate.

An Action of Waste lies for him that has the immediate Estate of Inheritance for Waste done in Houses, Gardens, Woods, Trees, Lands, Meadows, or Exile of Men, to the Disherison of him in Rev'n or Rem'r.

Waste is either Actual, as where Lessee pulls down Houses; or Permissive, as when he suffers a House to be burnt by Negligence, or Mischance, or suffers it to be uncovered, whereby the Timber becomes rotten. To pull down a House, is Waste, tho' it were ruinous when the Lessee came in, unless he after rebuild it: But to suffer it to be uncover'd is not Waste, if he found it uncover'd.

If Windows, Wainscot, Benches, Doors, or Furnaces, &c. fix'd to the House either by the Ten't, or him in Rev'n, be broken or carried away, it is Waste.

Ten't must keep the House from wasting, tho' no Timber grow on the Ground.

If he do or suffer Waste, and repair before the Action is brought, an Action of Waste

Waste lies not, but he cannot plead *non fecit* *vastum*, but must shew the special Matter.

To cut down Fruit-Trees in an Orchard or Garden is Waste; but if they grow on other Ground, it is not.

(a) 1 Roll. A.
507. contr.

It is (a) Waste to build a new House for it may be much to the Landlord's Profit and Judice; and it is also Waste to suffer it to be wasted when built, for then it is as much to the Landlord's, as if built by himself.

It is Waste for Ten't of a Dove-house, Warren, Park, Vivary, &c. to take so many, that such sufficient Store be not left as he found, or to suffer the Pale to decay whereby the Deer are dispersed.

To cut down or top, or do any Act that may decay Timber Trees, is Waste, to suffer the young *Germins* to be destroyed, the Destruction; Oak, Ash, and Elm, are Timber every where; Beeches, &c. are Timber only in those Places where they are used in Building, for Man's Habitation.

Lessee may cut down Underwood, but if he suffers the young *Germins* to be destroyed, or stub up the same, or cut down Beech, Maple, &c. standing in Defence of the House, or stub up, or suffer to be destroyed, a Quickset Fence of White Thorn, for these and such like Destructions, an Action of Waste lies against him.

To cut down dead Trees is no Waste, but turning of Trees to Coal for Fuel, when there is sufficient Dead Wood, is Waste: So to dig for Gravel, Stones, &c. in Mines not open when he came in, unless it be for the Repairs of his House.

ears. To suffer Houses to be wasted, and then
non fecit All Timber to repair them, is double Waste.
 Matter It is Waste to suffer the Wall of a River
 Orchard the Sea to decay, whereby the Meadow
 grow on Marsh is surrounded, and becomes un-
 profitable. But it is no Waste punishable,
 y House if it be suddenly surrounded by the Rage
 d's Pro of the Sea. If the House be uncovered by
 fer it a Tempest, the Ten't must in convenient
 as much Time repair it, but he is not compellable
 lf. to repair a House wholly destroy'd by a
 e-house Tempest, Lightning, Enemies, &c.
 take It is Waste to convert Arable into Wood,
 not let or *è converso*, or Meadow into Arable. The
 o decay Ten't may take sufficient Wood to repair
 the Fences as he found them, but not to make
 Act than new, and he may also take sufficient Botes.
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 but i bours without Suit; yet Waste lies, *for such*
 destroy Grant is void, the Design being not to make
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 rn, for Exile of Villeins or Ten'ts *W.* or making
 Action them poor, whereby they depart from their
 Tenements, is Waste, and in the Statute of
 Wastes *Glouc.* is comprehended under the general
 Fewel Word Waste. Waste and Destruction in
 od, is their larger Sense are convertible.
 s, &c. Sometimes one shall join in an Action of
 unde Waste for Conformity, in Respect of his
 Interest

Interest in the Place wasted, tho' he has no an Inheritance; as if a Reversion be granted to two and the Heirs of one of them; or if two Jointenants, one in Fee, the other for *L.* join in a Lease *L.* they shall join in an Action of Waste.

Vid. Co.
L. 258.

Ten't *T.* hanging an Action of Waste, becomes Ten't *T. Apres*, &c. the Action fails, *because the Inheritance, which is the Ground of it is determined.*

(a) 1 Lur. w.
303. contra.

(b) Co. L.
198. a.

One cannot have an Action against an Executor for Waste done by the Testator, nor can the Heir or Successor have it for Waste done in the Time of the Ancestor or Predecessor, for *Actions grounded on Torrs die with the Person.* (a) But if there be two Parceners of a Rev'n, and the Ten't do Waste, and one of them die, the surviving Parcener, and the Issue of the other shall join in an Action of Waste, (a) *and the surviving Parcener shall recover Damages.* And see the 20 Ed. 1. which gives an Action of Waste to the Heir, for Waste done in the Life of his Ancestor.

54.

Land is given to *A.* for *L.* to *B.* in Fee, *B.* shall not have an Action of Waste against *A.* on the Statute of *Gloc.* because they are Jointenants, but *B.*'s Heir shall.

The Action of Waste ought regularly to be brought against him that did the Waste; but if the Grantee of Ten't in Dower or by Curtesy, do Waste, the Heir in Respect of the Privy, shall have an Action against the Ten't in Dower or by Curtesy, and recover the Place wasted against the Grantee. But

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h Ten'ts assign their Estates, his Gran-
e shall have an Action against the Af-
nee only. It is said, (b) that if Guar-
an by *Kt.*'s Service did Waste, and as-
n'd over his Estate, that Action lay a-
inst the Assignee.

(a) F. N. B.
56. A. Cont.

Ten't in Dower, or by Curtesy, Lessee *L.*
T. shall answer for Waste done by a
Stranger; but Guardian by *Kt.*'s Service
should not, because it was so penal to
him, for by *Magna Charta* 4. *Gloc.* 5. he
should lose the whole Wardship, let the
Waste be ever so small, and if that an-
swered not the Damages, should satisfy o-
ver and above, and if the Action were
brought against him by the Heir of full
age, he should pay treble Damages.

An Infant, Baron and Feme, shall be pu-
nish'd for Waste done to a Stranger, and so
shall the Wife, that has the Estate by Sur-
vivor, for Waste done by the Husband in
his Life-time; for Waste is against the pub-
lick Good, and the Lessor shall not be preju-
diced by the Ten't's Nonage or Coverture.

If there be two Jointenants for *L.* or *T.* 2 Inst. 402.
and one do Waste, it is the Waste of
both as to the Place wasted, not as to the
Damages.

The Husband of Lessee *L.* does Waste,
he dies, no Action lies against him in the
Tenuit, for she was Ten't, and he was only
seis'd in her Right; but if the Wife were
but Ten't *T.* an Action would lie against
him,

him, for the Law gives the Term to him surviving the Wife.

Lessee *L.* grants his Estate on Condition Grantee doth Waste, Grantor re-enters the Action lies against the Grantee, and the Place wasted shall be recovered.

(a) Vid. Co.
L. 184. b.

A (a) Villein being Lessee *L.* doth Waste, Lord enters, he shall not be punish'd for the Waste done before, but for Waste done after, he shall.

Vid. supra.
57, 58.

If a Lease be made to *A.* and his Heirs, during the Life of *J. S.* and *A.* die, the Heir shall be punish'd in an Action of Waste.

Land is let to *A.* for *L.* Rem'r to *B.* for *L.* Rem'r to *C.* in Fee, no Action of Waste lies against *A.* during the Life of *B.* for if the Place wasted should be recovered against *A.* it would destroy *B.*'s Rem'r of the Freehold, which is much favoured in Law. But if *B.*'s Rem'r had been but for Years, an Action of Waste would have lain; but *Q.* If *B.* should have no Remedy in an Action on the Case against the first Lessee? If Lessor grant his Rev'n for Years, he cannot have an Action of Waste during the Years, because he has granted away the Rev'n, in Respect whereof such Action is to be maintain'd; but if he had only made a Lease *T.* of the Land in Rev'n, he might have had an Action during the Years, for in such Case, the Privy remain'd between him in Rev'n and the Ten't, as it was before, and tho' the Place wasted be recovered against the Ten't, yet such a future Interest remains, for it does not require a particular

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does.

Waste lies (a) not against Guardian in Socage. Nor does it lie against Ten't by Execution. (a) F. N. B. 59. E. 2 Inst. 305. contra.

If Ten't L. or T. or their Assigns, grant over their Estate, and take the Profits, Waste lies against them by 11 H. 6. 5.

If Waste be done, *Sparsim*, here and there, in Woods or Houses, throughout the whole, all the Woods or Houses shall be recover'd; but if it be in particular Parts only, so much only shall be recovered.

Trees of the Value of 3 s. 4 d. have been adjudg'd Waste, but *Bracton* says that some Waste, *est ita modicum, ut propter illud inquisitio non sit facienda*.

If a House be ruinous when the Ten't comes in, or be burnt by Lightning or Enemies, or the Lessor be bound to repair and will not, or the Lease be without Impeachment of Waste, tho' he be not compellable to repair, the Lessee may fell down Timber growing on the Ground to repair it, or rebuild it as large as it was before, and justify his so doing, for the Law favours Houses for Man's Habitation: And one Jointenant, or Ten't in Common, may have a Writ *De reparatione faciendâ* against the other suffering an House to decay.

Lessee L. or T. of Land may dig and take the Profits of open Mines, but he cannot dig for new, notwithstanding the Land be let with the Mines; for where the Words will bear a natural and easy Construction, is Explanatory of what otherwise would be

dubious, they shall not be construed so hardly against the Lessor, as to put it in the Power of the Lessee to ruin the Land: But if the Land be let with the Mines, and no Mines be open at the Time of the Lease, the Lessee may dig for Mines, else those Words would be absolutely void.

A greater Estate may support a less, *non e converso*; as if a Lease *L. Rem'r T.* be given to the same Person, both Estates remain distinct in him, and he may grant over either of them: But if a Lease *T. Rem'r L.* be made to the same Person, the latter drowns the former.

Vid. supra.
31.

If a Lease *L.* be made to *A. Rem'r L.* to *B. Rem'r* to *A's* Heirs, the Fee vests in *A.* So if a Lease *L.* be made to *A. Rem'r* to his Executors for *T.* the Chattels vests in *A.*

Of Ten't at Will.

TENANT at Will is one in Possession of Tenements, by Force of a Lease thereof made to him to hold at Will of the Lessor, or at the Will of the Lessee; for if it be at the Will of one of the Parties, the Law implies that it shall be at the Will of the other also.

If Lessee *W.* sow Corn, or Flax, or Hemp, or set Roots, or any other Thing that yields a present annual Profit, and the Lessor oust him before it be ripe, the Lessee shall have free Entry, Egress and Regress, to cut it off, &c. and carry it off, because he knew not when the Lessor would enter. But if Lessee *T.* sow the Land with Corn, &c. and before

before it be ripe the Term expire, the Lessor shall have the Corn; and if Lessee T. or W. plant young Fruit-Trees, or Oaks, Ashes, Elms, &c. which yield no present annual Profit, Lessor shall have them when the Lease is determined.

It seems that if Lessor reserve a Rent, Lessee (a) before the Rent-Day can't determine his Will, so as to avoid Payment of the Rent.

(a) 1 Roll
Ab. 861.
1 Syd. 339.

If Lessee W. or L. or Lessee T. of Lessee L. Husband seisd in his Wife's Right, Ten't *pur autre Vie*, or any other whole Estate is uncertain, so the Land, and their Estate determine by Death, they, or their Executors, shall have the Corn. So if Ten't by Statute Merchant sow the Corn, and then be satisfied by a sudden Profit. But if Husband and Wife be Jointenants, and he sow the Land and die, it is said that the Wife shall have the Corn, *which, as necessary to the Land, shall go with it to the Survivor.*

If Lessee W. determine his Will, or if a Woman, Ten't *durante viduitate*, marry, or if a Lease be determined by Title Paramount, or Act of Lessee, as Forfeiture, Breach of a Condition, &c. the Lessee shall not have the Corn.

If a Dis'sor sow the Land, and Dis'see re-enter, he shall have the Corn, tho' it were sever'd by the Dis'sor, for his Regress recontinues his Freehold in Judgment of Law from the Beginning.

If Lessee W. improve a Meadow by Over-flowing, trenching, or sowing Hay-seed,

Ec. the Lessor shall have the Grass, because it is the natural Profit of the Land.

There is an express and imply'd Determination of the Lessor's Will; Express, when he comes on the Land, and forewarns the Lessee to occupy; ImPLY'd, when without Consent he cuts down a Tree, (not being excepted in the Lease,) or puts in his Beasts to a Common appendant, or does any other Act which would amount to a Wrong, if the Lease continued. But Words spoken by the Lessor, from the Ground, determine not his Will till the Lessee, have Notice; no more than one can discharge a Factor or Attorney without Notice. If a Lease *W.* be made to or by a Feme Sole, and she marry, yet the Lease continues; so if Husband and Wife lease the Wife's Land at Will, and the Husband die, or if there be two joint Lessors or Lessees *W.* and one die, in all these Cases the Lease continues.

56.

As the Law gives the Corn to the Lessee, so it gives him free Entry, &c. to carry it off, for *quando Lex aliquid alicui concedit, concedere videtur & id, sine quo res ipsa esse non potest*, and if the Lessee be disturb'd of the Way, he shall have an Action on the Case. But if a Ditch be made overthwart a publick Way, no one disturb'd by it can have an Action on the Case, (unless he suffer a special Damage,) lest there should be a Multiplicity of Actions; but such a Nuisance must be presented in the Leet, or Torn. But every Inhabitant of a Town may have an Action on the Case for a Disturbance

flurbance in a customary Watering-Place, otherwise he should be without Remedy.

There be three Kinds of Ways; 1. A Footway, in Latin, *iter*. 2. A Pack and Prime-Way, call'd *Aetus ab agendo*. 3. *Via* or *Aditus*, which contains the other two, and a Cart-Way. This is either *Via Regia*, which is common to all Men, or *communis Strata*, belonging to a City or Town, or between Neighbours and Neighbours.

If Lessee *W.* bring his Goods into the House, and the Lessor oust him; he shall have free Entry, &c. to carry away the same; so the Executors of one seisd of an House in Fee, or Tail, shall have free Entry, &c. to carry away the Testator's Goods, and what Time shall be reasonable for carrying off the Goods the Justices shall determine according to their Discretion.

A Cottage is a little House without Land. If one have a House near mine, which he suffers to be so ruinous, that it is like to fall on mine, I may have a Writ *de Domo reparanda* against him. But a *Precept* lies not *de Domo*, but *de Messuagio*.

If a Man make a Deed of Feoffment, and deliver it, but do not give Seisin, he to whom it is made may occupy the Land, at the Will of him that made it.

No Action lies against Lessee *W.* for permissive Waste, but if he be guilty of voluntary Waste, Trespass *quare vi*, &c. lies against him for taking such Power on him so much concerns the Freehold, that it amounts to a Determination of his Will. So if he to whom I lend my Cattle, kill them,

I may have Trespass or Trover against him. There are no Accessories in Trespass or Treason, but all are Principals.

If Lessee *W.* grant over his Estate, and the Grantee enter, he is a Dis'sor; for tho' the Grant be void, it amounts to a Determination of the Lessee's *W.* *inasmuch as by it he claims a Power inconsistent with a Lease W.*

Lessor *W.* may reserve a yearly Rent, and have an Action of Debt, or distrein for it, for it is distreinable of common Right, tho' it be not Rent-Service for want of Fealty. But if the Lessor impound the Distress on the Ground lett, this determines his Will.

Ten't *W.* is always by Right; Ten't a Sufferance comes in by lawful Demise, and holds over by Wrong; such a one in Judgment of Law has a bare Possession, and tho' the Writ *ad terminum qui præterit*, which, *being a real Action, supposeth him Ten't of the Freehold*, lay against him, this is rather by Admission of the Demand't than for any Freehold that is in him. As if Ten't *T.* of Rent grant the same in Fee, and die, the Heir may bring a *Formedon*, and admit himself out of Possession.

No one can be Ten't by Sufferance against *K.* but his Ten't holding over is an Intruder.

If Lessor *W.* die, and Lessee continue in Possession, he is Ten't by Sufferance, and yet the Heir by Admission may have a *Mortancestor* against him, *for by the Lessor's Death the Lease was absolutely determined, and there never was any Privity between*

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between the Heir and the Lessee; but at Law Trespass or Assize of Novel Disseisin would not lie against any Ten't by Suffe-
rance, because these Actions suppose a Wrong done to an actual Possession. But now by 6 Annæ 18. Guardians, Trustees, or Husbands seisd in Right of their Wives, or Ten'ts pur autre Vie, holding over without Consent of the Persons intituled, shall be adjudg'd Tref-
passers. But Guardian holding over is not Ten't at Suffe-
rance, but an Abator, against whom Mortancester lies, because his par-
ticular Estate was created by Act of Law.

Of Ten't by Copy.

58.

Tenant by Copy, is where there is a Manor, in which Time out of Mind certain Ten'ts have used to hold certain Te-
nements in Fee, T. or L. &c. at the Will of the Lord, according to the Custom of the Manor. Such Ten'ts hold by Copy of Court-Roll, but no other Ten'ts hold by Copy. *Bracton* calls them *Villanos Sockma-
nos*, because, tho' Free, they hold by base Tenure, by doing of Villein Services.

A Court-Baron holden out of the Ma-
nor is void; but if a Man be Lord of two or three Manors, and there be a Custom to hold a Court at one for 'em all, such Courts are by Custom good. This Court is of two Natures, the 1st is by Common Law, and call'd the Freeman's Court, or Court-Baron, and of this the Suitors are Judges, and the Steward is Register, and this may be kept from three Weeks to three

Weeks. The 2d is a Customary Court, and concerns Copyholders, of which the Lord or his Steward is Judge; as the first can't be without Freeholders, so this can't be without Copyholders. A Court Baron may be of this double Nature, and then the Roll contains Matters concerning both.

Any one that is lawful Lord for the Time, tho' Ten't at Will only, may make voluntary Grants of ancient Copyholds that come into his Hands, and such Grants shall bind him that has the Freehold and Inheritance. *For the Estate of a Copyholder depends upon the Custom, which is not the less Strong for the Weakness of the Lord's Estate.* Dis'sors, &c. having defeasible Titles, may make Admittances, *for it would be hard that the Dis'sees neglect to recover his Right, should bar the Copyholder of his Power to transfer his Estate during the Dis'in.* But they cannot make voluntary Grants to bind the Dis'sees, *for the Dis'sors Want of such Power is prejudicial to none but themselves.*

If the Lord devise that his Executors shall grant such Tenements for Payment of his Debts, they may make good Grants, tho' they have nothing in the Manor.

Three Things are requisite in a Custom to make a Copyhold. 1. Time out of Mind. 2. That the Tenements be within the Manor. 3. That they have been demised or demisable Time out of Mind.

One may grant a Manor by Copy according to Custom, or Underwoods without the Soil, or the Herbage of Lands, and generally

nerally any Lands or Tenements, and whatever concerns them.

59.

If such Ten't alien by Deed, the Lord may enter into the Land as forfeited; but if such Ten't would alien, he ought according to the Custom to make a Surrender to this Effect: *Ad banc curiam venit A. de B. & sursum reddidit in eadem curia unum Messuagii, &c. in manus Domini ad usum C. de D. & hered', &c. & super hoc venit prædict' C. de D. & cepit de Domino in eadem curia Messuag' prædict' habend' & tenend' sibi & hered', &c. ad voluntatem Domini secundum consuetud' manerii faciend' & reddend' inde servitia, &c. prius debita & consueta, & dat Domino pro fine, &c. & fecit fidelitatem.* But he that has a Right to a Copyhold, may release by Deed, or Copy, to one admitted Ten't *de facto*, for nothing is more favour'd than the quieting of Possessions, and such Release enures not by transferring an Estate, but extinguishing the Right. A Lease *T.* made by a Copyholder forfeits his Estate, but a Deed of Feoffment, or of Demise for Life, without Livery, does not, for nothing passes thereby; and by the general Custom of the Realm, a Lease for (a) one Year is no Forfeiture.

(a) 9 Rep.
75. b.
4 Rep. 26. a

It is the general Custom of the Realm to surrender in Court, or out of it, into the Hands of the Lord, and there is no need in Pleading to alledge a Custom for it, but a Custom must be alledg'd for a Surrender out of Court into the Hands of the Lord by the Hands of the Reeve, &c.

F 5

By

By Custom a Freehold may pass by Surrender, without the Lord's Leave, in his Court, and be delivered over to the Feoffee by the Bailiff.

The Surrender to the Lord expresses no Estate, for he is but an Instrument, and *cestuyque Use*, when admitted, is in by the Surrenderer. If the Limitation be general, *cestuyque Use* takes but for Life, and the *Rev'n* remains in the Surrenderer, if he were *seis'd in Fee*. (b) But if a Copyholder for Life surrender to the Use of A. B. and the Lord grant the Land to A. B. accordingly, the Estate of the first Copyholder is determined, and no *Rev'n* remains in him.

(b) Cro. C.
204.
Sir W. Jones
229.

A Copyholder being a Jointenant, surrenders out of Court his Part into the Lord's Hands, according to the Custom, to the Use of his Will and dies, and this is presented at the next Court, his Devisee shall be admitted, for by the Surrender the Jointure was severed, and the Estate pass'd to the Lord on a Condition subsequent, that the Surrender were presented at the next Court. If Lessee *L. T.* or *W.* of a Manor take a Surrender, and his Estate be ended before Admittance, the Lessor is bound to admit according to the Surrender.

A Fine may be due by Custom on every Change of the Ten't, whether by Act of God or the Party; and on every Change of the Lord by Act of God; but Custom to have it on Change by Demise of the Lord, &c. is void. Fines may be certain or uncertain, but if the Lord set an unreasonable Fine,

Fine the Ten't is not bound to pay it: Whether it be reasonable or no the Judges shall determine.

60.

Copyholders shall not implead nor be impleaded in the K.'s Courts, by the K.'s Writs, for their Tenements, but shall make their Plaint in the Lord's Court, and make Protestation to follow it in the Nature of one of the K.'s Writs as *Formedon*, *Affize*, &c. Nor can they have a Writ of false Judgment, but must sue to the Lord by Petition in Nature of such Writ, and therein assign Errors. *But a Copyholder's Lessee for one Year may have an Ejectment, for his Term is warranted by the general Custom of the Realm.* 1 Rep. 16. a.

Custom of it self can't create a State in Tail, for the Common Law looks on it as unreasonable to take from a Man the Disposal of his own Estate. But where such Custom was used before W. 2. it was confirm'd by it, by an equitable Construction (a) but the said Statute extends not to other Copyhold Manors, in which such Custom has not been used; for if it should, it would be prejudicial to the Lord in preventing his Fine for Alienation, &c. It is no Proof of such Custom, that Lands have been granted by Copy to many, and the Heirs of their Bodies, but if a Rem'r have been limited and enjoy'd, or the Issue have avoided his Ancestor's Alienation, such are good Proofs of an Estate Tail. As Copyhold by Custom may be intail'd, the same by like Custom, by Surrender, may be cut off. Copyholder doing his Services, being ejected (a) Q. 2. Lev. 327.

ejected by the Lord, shall have an Action of Trespass, for he is as well an Inheritor to have his Land according to Custom, as he that has a Freehold at Common Law.

Of Ten't by Verge.

61.

TENANT by Verge is of the same Nature as Copyholder, so call'd, because when he surrenders to the Lord's Hands to the Use of another, he delivers a Verge or Rod to the Steward, and he who shall have the Land takes it up in Court, and his Taking is inrolled, and the Steward delivers to him the same Rod, or another in the Name of Seisin of the Land.

A Steward may be retain'd to keep Courts Leet or Baron, without Deed, which Retainer shall continue till he be discharged. The Lord may admit out of the Court, and out of the Manor also.

62.

In some Manors there is a Custom, that a Copyholder, out of Court, may surrender to the Bailiff, &c. to the Use of another, who shall have the Land in *F. T.* or *L.* and that this shall be presented the next Court, and if it be not then presented it is void.

Tho' a Copyholder have an Inheritance according to the Custom of the Manor, yet inasmuch as he has no Freehold at Common Law, he is call'd Ten't by base Tenure. If a Man lett Land to *A.* which is not in a Manor wherein such Custom has been used, to have and to hold to him and his Heirs at the Will of the Lessor, these Words [his Heirs] are void, and if he die, and his
Heir

Heir enter, an Action of Trespass *quare vi*, &c. lies against him.

If there be no Custom to the Contrary, Waste permissive or voluntary forfeits a Copyhold.

A Copyholder shall do Fealty, but Lessee *W.* shall not.

63.

Of Homage.

When a Ten't did Homage, he was ungirt, and bareheaded, and kneel'd on both his Knees, before the Lord sitting, and held up his Hands together between the Lord's Hands, and said thus; 'I become your Man from this Day forwards of Life and Limb, and of earthly Worship, and shall be True and Faithful to you, and bear you Faith, for the Tenements which I claim to hold of you, saving the Faith that I owe to our Sovereign Lord the K.' and then the Lord so sitting kiss'd him.

64.

All Lands in *England* in Subjects Hands, are holden of some Lord by some Service, and were originally derived from the Crown, therefore *K.* is Lord mediate or immediate of them all.

65.

One under 21 Years might do Homage, but it seems that he can't do Fealty, because he can take no Oath till the Age of 21, except that of Allegiance which he may take at 12.

An Ecclesiastical Person doing Homage, should not say, I become your Man, &c. for he profess'd himself to be only the Man of God, but he should say thus, 'I do Homage

' Homage to you, and I shall be True and
' Faithful to you, &c.

66.

A *Feme Sole* doing it, should not say, I become your Woman, for 'tis not convenient for her to say so to any but her Husband, but she should say, ' I do you Homage, and ' shall be True, &c.' Husband and Wife, before Issue had, should jointly do Homage for her Land, and the Husband should speak the Words, and the Lord should kiss 'em both: So in doing Fealty, both shall lay their Hands on the Book, he shall speak the Words, and both shall kiss the Book.

The Ten't ought to express for what Lands he did the Homage. If he held other Lands of other Lords by Homage, he should say in the End of his Homage done to one of them, ' Saving the Faith which ' I owe to our Lord the King, and to my ' other Lords.

None should do Homage but such as had a State in Fee or Tail in their own Right or another's, for it was a Maxim, That he that had a State but for *L.* should neither do nor take Homage. But Ten't by Curtesy Initiate may not do Homage, or receive it alone in the Right of the Wife, for he not only has a Title to be Ten't by Curtesy after the Wife's Death, but he also holds the Fee in her Right during her Life. But after her Death he should neither do nor receive it. So Parson, Vicar, &c. should neither do nor receive Homage, for they have but a qualify'd Fee. But Bishop or Abbot might do or receive it in Right of
the

the Bishoprick, &c. for they have an absolute Fee: But a Corporation Aggregate of many Persons capable could not do it, nor receive it. For the Fee vests not either jointly, or in Common, in the Persons whereof the Society consists, but in the Body Politick, form'd by Operation of Law from the Persons so untited, which is indivisible, and exists only in Supposition of Law, and can do no Act but by Attorney, but Homage must be done and (a) received in Person. But in the Case above, the Fee vests in the Bishop, &c. in his politick Capacity, as much as it does in the Person of a natural Man in his natural Capacity. (a) Litt. Sec. 52.

Lessee L. or T. of a Seigniori holden by Kt.'s Service, should have (b) Escuage, Ward, Marriage, and Relief of the Ten'ts, tho' he could not receive Homage, and should in Avowry suppose that the Ten't died in his Fealty. (b) Co. L. 73. b.

If several Parceners held of K. in Capite, and were all within Age, and in Ward to K. the Eldest alone should do Homage for all; but if they were all of full Age, all should do it to K. But where the Tenure was of a Subject, the Eldest only should do it; but after Partition, every one should do it, for they have not one, but several Inheritances. Notwithstanding, the Eldest had done Homage for all the Sisters, yet if any of them had made Feoffment of her Part, the Feoffee should do it for a Feoffment is a Partition in Law, and Ten'ts in Common do several Services. And the Feoffee

Feoffee of what Part soever holden by Homage, was bound to do it.

Jointenants should do Homage and Fealty jointly: And he that did Homage to one Jointenant or Parcener of Seigniorie, was excus'd against the other.

(a) Litt.
Sec. 454.

If a Ten't from whom Homage was due, had made a Feoffment, he should not do Homage, for tho' he be suppos'd to be Tenant as to the Lord's Avowry, (a) *until the Feoffee become Ten't to the Lord*, yet the Feoffee is very Ten't, and the very Ten't alone shall do Homage; but Once in T. tho' he had discontinued the Tail, or a Mesne might do Homage, for they are very Ten'ts to their respective Lords, tho' they are not Ten'ts of the Land.

Where Homage was Part of the Tenure, it was presumed that the Land was holden by Kt.'s Service, if the contrary were not prov'd.

By Custom, the Heir of one that held by Homage only should be in Ward.

By 12 Ca. 2. 24. This Tenure is abolis'd.

Of Fealty.

Fealty, in Latin *Fidelitas*, was at Law incident to Homage, he that does it shall lay his right Hand on a Book, and say thus; 'Know ye this, my Lord, that I shall be Faithful and True to you, and Faith to you bear, for the Lands that I claim to hold of you, and that I shall lawfully do to you the Customs and Services which I ought to do at the Terms assign'd. So
I help

68.

help me God.' And he shall kiss the Book. But no Oath should be taken by one in doing Homage to his Lord, because no Subject shall be sworn to another, to become his Man of Life and Limb, but to K. only; and that is call'd the Oath of Allegiance, or *Homagium Ligeum*.

A Steward may take Fealty, but Homage could be done to none but the Lord.

The Ten't must do Fealty in his proper Person, for no Man by the Common Law can swear by Attorney.

Fealty shall be done by every Freeholder, and Ten't *T.* and it gives a sufficient Seisin of all Manner of Services.

Of Escuage.

Escuage, in Latin *Scutagium*, was a Species of Kt.'s Service. Some held by the Service of a whole Kt.'s Fee, some by the Service of half a Kt.'s Fee: And when the K. made a Voyage Royal into Scotland to subdue the Scots, he that held by a Kt.'s Fee ought to be with the K. 40 Days well arrayed for the War; he that held by half a Kt.'s Fee ought to be with him 20, and those that held by more or less, ought to be with him more Days, or fewer, in the same Proportion. And one might hold to serve K. in his Wars in other Countreys, as well as Scotland.

A Hide or Plow-Land, or so much as a Plough can till, which may contain Wood, Meadow, and Pasture, was anciently worth 5 Nobles *per Annum*, and esteemed the Living

69.

ving of a Yeoman; 12 of these made one Kt.'s Fee, which was 20*l. per Annum*; 13 Kt.'s Fees and a half made a Barony, which was 400 Marks *per Annum*; 20 Kt.'s Fees made an Earldom, which was 400*l. per Annum*; and of latter Days, two Baronies made a Marquisdome, two Earldoms, a Dukedom; and 'tis not proper to compute what shall be a sufficient Livelihood of such Persons from the Quantity of the Land, but rather from the Value of it.

By *Magna Charta* 2. The Relief of a Kt. and all above him that were Noble, was the 4th Part of their yearly Revenue. *e. g.* That of a Kt. was 5*l.* of a Baron 100 Marks, of an Earl 100*l.* and by the Equity of this Statute, Marquisdoms and Dukedoms which have been created since, were within the same Rule.

A Voyage Royal is not only when the King goes in Person to War, but likewise when his Lieutenant, or Lieutenant's Deputy goes. The Judges, not the Marshal, shall determine what is a Voyage Royal. There is a Voyage Royal of Peace, as when the King's Daughter goes beyond Sea to be married, but this is not here spoken of.

Ten't by Cornage, tho' that were Kt.'s Service, paid no Escuage, for that was paid by those only that held to go with the King to War.

Sir R. R. held by Serjeanty, to be the K.'s fore Footman when he went into *Gascain*, till he had wore out a Pair of Shoes Price 4*d.* and this being to be perform'd when the King went to *Gascain*, to make War, was Kt.'s Service.

If the Lord himſelf went not, he ſhould pay Eſcuage, but his Ten'ts were excus'd, for he ſhould have no Benefit by the Default of others, who was guilty of the like himſelf. Ten't may avail going to the War excus'd all the Meſnes, and one Jointenant going excus'd all the reſt, for the Service originally reſerv'd on the Tenure was perform'd.

Co. L. 70. b.

Magna Charta ſays, that no one ſhall be diſtrain'd for Caſtle-guard, *ſi ipſe eam facere voluerit in propria Perſona ſua, vel per alium probum hominem faciet, ſi ipſe eam facere non poteſt propter rationabilem Cauſam*. This was declarative of the Common Law, and in like manner, if Ten't by Eſcuage ſent a Man to the War, he needed not go himſelf; and where the Act ſays *propter rationabilem Cauſam*, yet the Cauſe was nether Material nor Iſſuable, but it ſhould be left to the Ten't's Diſcretion, for the End of the Service was the Defence of the Realm, and there were ſo many juſt Excuses, that it would be dangerous, and tend to the Hinderance of the Service, if they ſhould be iſſuable, & multa in jure communi contra rationem diſputandi pro communi utilitate introducta ſunt. Every Biſhop has a Barony holden of K. in Capite, and ſhould do Homage, and find a Man for the War, or pay Eſcuage, but his Succeſſor ſhould never be in Ward; nor ſhould he pay Relief (unleſs he were bound to pay it by Grant or Preſcription); yet if the Land had afterwards been convey'd to a Natural Man and his Heirs, his Heir ſhould be in Ward, or pay Relief, &c. *ceſſante enim ratione legis ceſſat ipſa Lex*.

70.

Co. L. 84. a

In

71.

In the Time of Sir W. H. Chief Justice, by the
the Common Pleas, it was demurr'd in Law, whether the 40 Days should be reckon'd from the Day when the Army was muster'd, or from the Time when the King first entered into the Foreign Nation. But it seems they shall be reckon'd from the latter, for then the War begins.

Justices of the Common Pleas, are called *Justiciarii de Banco*, because they sit in their Seat of Justice as in a certain Place, and Writs returnable in that Court are, *Coram Justiciariis Nostriis apud Westmon.* or some other certain Place. But the Court of King's Bench is so called, because the King anciently sat there in Person, and all Writs returnable there are, *Coram nobis ubicunque fuerimus in Angliâ.* And all Records there are stiled, *Coram Rege.*

As there is no Issue on the Fact, so there is no Demurrer in Law, but when it is join'd between the Parties.

If the Court be equally divided, or conceive great Doubt, they may adjourn a Cause into the Exchequer-Chamber, where it shall be argued by all the Judges, and if they be equally divided, it shall by 14 Ed. 3. 5. be decided at the next Parliament, by a Prelate, two Earls, and two Barons, commission'd by K. and if they can't determine it, the House of Lords shall. See the Statute.

He that demurs, confesses all Facts which are well pleaded.

When there is an Issue for Part, and Demurrer for Part, the Demurrer shall be first decided

decided, but the Court on Diſcretion may
by the Iſſue firſt.

Sometimes one may plead ſpecial Matter,
and conclude with Demurrer, as in an
Action of Treſpaſs by *J. S.* for taking his
Horſe, the Defendant pleads in Bar, that he
was poſſeſs'd till diſpoſſeſs'd by *J. S.* who
gave him to the Plaintiff: The Plaintiff
ſays, that *J. S.* nam'd in the Bar, and *J. S.*
the Plaintiff, are one Perſon, and to the Bar
demurs: This is good, for without it he
can't demur.

There is alſo Demurrer to Evidence,
which none can reſuſe to join in, except
K. but in his Caſe the Court may direct
the Jury to find the (a) whole ſpecial
Matter.

(a) Dy 53.
Pla. 8.

Notwithſtanding, Eſcuage were due to
the Lord by Tenure, yet in aſmuch as it
concern'd ſo great a Number of the Subjects
of the Realm, it could neither be aſſeſs'd,
nor diſtrein'd for by *K.* or any other Lord,
till the Parliament had aſcertain'd how
much every one that held by a whole *Kt.*'s
Fee, or half a *Kt.*'s Fee, &c. that was not
with *K.* by himſelf, or ſome other, ſhould
pay to his Lord for Eſcuage. If the Ten't
died in the Hoſt, no Eſcuage could be de-
manded.

Eſcuage has not been aſſeſs'd ſince the
Reign of *Ed. 2.*

73.

Some held by Cuſtom to pay but the
Moiety, or the fourth Part of the Sum at
which Eſcuage was aſſeſs'd by Parliament,
and becauſe the Eſcuage which they ſhould
pay was uncertain, they held by *Kt.*'s Ser-
vice

vice, but he that held by Eſcuage certain *i. e.* to pay his Lord a certain Sum for it, at what Rate ſoever the Parliament aſſeſs'd it, held in Socage. If one ſpeak generally of Eſcuage, it ſhall be intended of Eſcuage in certain, becauſe that is the worthieſt Senſe; ſo a Tenure *in Capite*, being ſpoken of generally, is underſtood to mean a Tenure of *K. ſecundum excellentiam*, tho' *ex vi Termini*, it may ſignify any Tenure in groſs.

The Lords of whom Lands were holden by Eſcuage ſhould have it when aſſeſs'd, for the Lands at firſt came from the Lords, and it is intended that they were given by them to the Ten'ts, to defend them, as well as the King. And the Lords might diſtrein for it, or have a Writ to the Sheriff to levy it for them; but of ſuch Ten'ts as held of the King by Eſcuage, that went not to the War, *K.* ſhould have it, tho' they held of a Manor which he had in Ward, or by Reason of the Vacation of a Biſhoprick.

When the Lord diſtrein'd for Eſcuage ſo aſſeſs'd, if the Ten't would aver that he was with the King all the Days requir'd, and the Lord averr'd the contrary, it ſhould be tried by the Certificate of the Maſhal of the King's Hoſt, under his Seal, ſent to the Juſtices.

74. In ſix Caſes the Tryal ſhall be by Certificate.

1. Whether one were with *K.* all the Time that he ought, ſhould be tried by the Maſhal's Certificate, as is aforeſaid.

2. If it be alledged in Avoidance of an Outlawry, that the Deſend't was at *Bur-*

deaux

Jeaux in *K.*'s Service, under the Mayor of *Burdeaux*, this (a) ſhould be tryed by the (a) 2. E. 4. ſaid Mayor's Certificate; *but this is to be un-* 1. 2. *derſtood when the ſaid Town was Part of* 4 E. 4. 10. b *K.'s Dominions.*

3. Customs of *London* ſhall be certified by the Mayor and Aldermen, by the Mouth of the Recorder.

4. Whether one have the Privilege of a Citizen, or be a Foreigner, ſhall be tryed by the Certificate of the Sheriffs.

5. Records ſhall be tryed by Certificate of the Judges in whoſe Cuſtody they are.

6. Excommunication, general Baſtardy, Profeſſion, Loyalty of Marriage and the like, are regularly to be tryed by the Ordinary's Certificate.

An Appeal of Death out of the Realm may, by the 1 H. 4. 14. be brought before the Conſtable, and Maſhal, whoſe Sentence is upon Teſtimony of Witneſſes, or Combat. This was ſo reſolved in Sir *Francis Drake's* Caſe, ſed *Regina noluit conſtituere Conſtabularium, & ideo dormivit appellum.* Some ſay, that this Statute extends to the Caſe of him that dies in *England* of a mortal Wound given out of the Realm, for it is not puniſhable at Common Law.

By 12 Ca 2. 24 *Eſcuage* was abolish'd.

Of Knights Service.

IF Ten't by *Kt.*'s Service had died, his Heir Male being under the Age of 21 Years, the Lord ſhould have had the Land holden of

of him till such Heir had arriv'd to the Age, because till then he was not intended to be able to do such Service, and the Judges ought to adjudge according to the common Intendment of the Law. Thus

Co.L. 78. b. the Law intends that a Parson is Resident on his Benefice, unless the Contrary be prov'd, and that one Part of a Manor is of the same Nature of the rest, and that a Will is not made by Collusion, &c. and that Neighbours are privy to one another's Actions, and that Things are fairly done when it stands indifferent whether they were so or no, &c. and the Judges ought not to adjudge otherwise.

And if an Heir Male were unmarried at his Ancestor's Death, the Lord should have had the Ward, and Marriage of him.

But if an Heir Female at her Ancestor's Death were fourteen Years old, the Lord should not have had the Ward of her at all, because she might have a Husband able to do *Kt.*'s Service.

If an Heir Female were unmarried, and under 14 at her Ancestor's Death, the Lord should have had the Land till she were 16, by *W. 1. 22.* to tender convenient Marriage to her, and if the Lord had died within the two Years, the Law gave the same Interest to his Executors and Administrators. But if the Lord had granted the Wardship of the Body of such Heir Female, and kept the Land himself, neither the Grantee nor Grantor should have had the Benefit of the two Years: Not the Grantee, because he had nothing to do with the Land granted;

Co. L. 78,
79.

not

to the Grantor, because he could not tender Marriage after he had granted over the Ward of the Body. And when the Lord had married such Heir Female within the two Years, she and her Husband might have enter'd.

By the said Act, if she had refus'd the Lord's Offer, he should have holden the Land till her Age of 21, and farther, till he had levy'd the Value of the Marriage. Tender of Marriage made to her before she was 14, by a Lord who might have had the Benefit of the two Years, was void. If the Lord had tendred no Marriage to her in the two Years, he lost the Value of it, by the exprefs Words of the Act. And notwithstanding such Heir Female were under 14, yet if she were married in her Ancestor's Time, the Lord should have had the Wardship of the Land no longer than while she was under 14.

Wardship was due to the Lord in respect of the Tenure, therefore if the Lord had releas'd his Seigniory to his Ward, or the Seigniory had descended to him, he should have been out of Ward, for *cessante causa cessat Effectus*, as if Conusee release all Debts to Conusor being taken in Execution he discharges the Execution.

After the Statute of Wills, if a Man had, by Act executed, disposed of all his *Kt.'s* Service Land for the Advancement of his Wife, &c. the Heir should have been barr'd as to the Whole, and yet have been in Ward for the 3d Part, *by the exprefs Words of the said Statute*. But if such Ten't had made a De-

vise of all his Kt.'s Service Land, it had been wholly void as to a 3d Part, *for the said Statute, which alone makes such Devise good, mentions only a Devise of two Parts of such Land.*

If Ten't by Kt.'s Service had made a Feoffment in Fee on Condition, and died, and his Heir had enter'd for a Breach, he should have been in Ward, tho' neither Estate nor Right descended to him, for the Land was restor'd to him in Nature of a Descent. In like manner, the Heir recovering *in dum non fuit compos*, *Formedon* in Descender, or Rem'r, as Heir, &c. should have been in Ward. So if Ten't T. with a Rem'r in Fee, had discontinued, and the Discontinuee had infeoff'd the Heir, he should have been in Ward, for as he was restor'd to the Title of the Land as Heir, so should the Lord to the Title of the Wardship; and tho' the Ancestor died not in the Lord's Homage, yet there was Right of Homage.

But the Heir of him that never was Ten't to the Lord, should not have been in Ward, as of him that took a Fine *sur grant* and died before Execution.

The Heir of Feoffee on Condition should have been in Ward till his Estate were defeated on Performance of the Condition. The Heir of Conusor of a Fine executory, should have been in Ward till the Conussee had enter'd.

The Lord should have had the Wardship of the Body of the Heir of the Diss'ce, and if the Diss'or had died seis'd, the Lord should have had the Ward of the Body of

his Heir, and of the Land also. But *Q.* how the Heir of the *Dis's* or in this Case could be in Ward, seeing the Entry of the Heir of the *Dis's* being within Age, could not be taken away by the Descent, and it (a) seems that the Lord in his Right might have enter'd on the Heir of the *Dis's* or.

(a) Co. Lit.
207. a. 245.
a. 258. a.

The Heir of *cestuyque* Use should have been in Ward by 4 *H.* 7. 17. and the Heir of the Feoffee also by the Common Law.

If Ten't *T.* with a Rem'r in Fee, had made a Feoffment, the Heir of the Feoffee should have been in Ward and the Heir of the Feoffor also, to the same Lord. But *Q.* For my Lord Coke seems to say in this very Page, that the Heir of such Ten't *T.* making a Feoffment should not be in Ward, till he had recover'd the Land.

If *A.* had made a Gift in tail to *B.* and *B.* had infeof'd *C.* and died, his Heir should have been in Ward to *A.* but if *C.* had died, his Heir should have been in Ward to the Lord Paramount, for *C.* was Ten't in Fait to him, and *A.* could not avow on *C.* or his Heir, for the Services due to him, for then it would appear of his own Shewing that the Rev'n was out of him.

If one had holden Lands of *K.* by *Kt.s* Service in *Cafite*, or as of the Duchy of Lancaster within the County *Palatine*, or as of some other certain Honors, (in which *K.* had as it were by Prescription, his Pre-rogative,) *K.* should not only have had the Ward of the Lands holden of himself, but also of those which were holden of other

Co. L. 78. a. Lords. And also all other Hereditaments, as Rents, Annuities, Commons, &c. tho' they lay not in Tenure, but if one had holden of K. by *Kt.*'s Service, as of other Honors, or Mannors, K. should only have had the Ward of the Lands holden of himself.

An Heir who had been in Ward by Reason of a Tenure *in Capite*, when he came to Age, must have sued Livery, *i. e.* to have had the Lands deliver'd to him by K. the Expence of which was half a Year's Profit of his Lands holden. But if the Heir had been of Age at his Ancestor's Death, he should have paid for Land in Possession a Year's Profit, for the K.'s primer Seisin, and Livery, and for Rev'ns expectant on Freeholds, half a Year's Profit. And K. should have had all the mean Profits till Tender of Livery were made, so if a Tender were made, and not duly pursued. But the Heir that had been in Ward to K. by Reason of a Tenure of him, as of an Honour, or Mannor, might at his full Age have sued an Ousteria *main cum exitibus*, and if he were of full Age at his Ancestor's Death, he should have paid Relief, and not primer Seisin.

Vid Stanf.
Præ. 12, 13.
&c.

Stanf. P. æ.
12. a.

If he that held of K. by Socage in Chief had died, his Heir being of full Age, K. should have had primer Seisin and Livery only of the Lands so holden, but if the Heir were under 14, K. should have had neither, because the Custody of his Body and Lands belong'd to the Guardian in Socage.

There was a General Livery, and a Special Livery, the first requir'd an Office in every County where the Heir had Land, and he must sue out his Writ of *Ætate probanda*, &c. and it concluded the Heir to deny a Tenure found in the Office. If it were not sued of all that *K.* ought to have, whether mention'd in the Office or not, or if the Office or Process whereon it was made, were insufficient, *K.* might reſeise the whole Land, and should be answer'd for the whole Profits. But a special Livery which was of Grace, not of Right, contain'd a Pardon, and avoided the said Dangers, and Charges. A Livery being in Nature of a Restitution was taken favourably, therefore if it were made of a Mannor *cum pertinentiis*, it included the Advowson Appendant; but Letters Patents made of a Mannor, do not include the Advowson, unless it be mentioned.

By 2 *E. 6. 8.* these Things were provided

1. Where an Office is found for *K.* he that has an Interest for Years, or by Copy, or any Rent, or Profit, of whatsoever Estate out of the Land, shall have them, tho' they be not found in the Office, in such sort as he should, if no Office had been at all.

2. Where the Heir was found to be of fewer Years than of Truth he was of, he might sue out his *ætate Probanda* at his full Age, but before the Statute, he was concluded by the Office.

3. Where one was found Heir, that in Truth was not Heir, or where one Person

Vid. Stanf.
Præ. 58. a.
59. a.

7 Rep. 44. b.

was found Heir in one County, and another in another County, the Party griev'd had no Remedy at Law to get Livery made to him, unless he were found Heir also by that or another Office in the same County, and then it was a great Doubt whether it should be tryed which of them were Heir by Interpleader immediately, or at the full Age of him that was found Heir first; but by this Statute the Party griev'd had his Remedy by Traverse, and Interpleader immediately, so that he had had an Office found for him also in each County.

4. Where it is untruly found that one is an Ideot, Lunatick, or Dead, such Office may be travers'd.

5. Where an Office finds that one attainted of Treason, &c. is seis'd of Lands, the Party griev'd may have a Traverse, or *Monstrans de droit*, tho' K. be intitl'd by double Matter of Record, and in such Case two Writs of Search only shall be awarded instead of the four formerly used.

6. If an Office were found by these Words or the like, *quod de quo vel de quibus Tenementa Prædicta Tenentur juratores ignorant*, or if it found a Tenure of K. *per que servitia ignorant*, &c. the first should not have been taken for an immediate Tenure of K. nor the second for a Tenure *in Capite*, but a *Melius inquirendum* should have been awarded by Force of the said Statute, and if the Office found thereon had been contrary to the first, it had taken off the Force thereof; but if it had been as uncertain as the first, the Tenure should have been taken

ken for a Tenure *in Capite*, for that was most for the K.'s Advantage. But if it had found a Tenure of K. as of a Manor, *per quæ Servitia*, &c. ignorant, it should have been taken for a Tenure by Kt.'s Service.

7. A Traverse was given to the Heir within Age, when Land was found to be holden of K. immediately, that was holden in Truth of others.

8. A *Scire facias* on every such Traverse must go out against the K.'s Patentee.

The Statute of *Marlbridge*, which avoided Feoffments of Kt.'s Service Land made by Collusion to an eldest Son, extended not to Gifts in T. or Leases L. made to the Son, with a Rem'r to others in Fee, nor to Feoffments made to the Son jointly with others, nor to any Feoffments made for the Advancement of the Feoffor's Wife, or Children, or Payment of his Debts.

But in all the abovemention'd Cases, the Heir should have been in Ward for his Body, and the 3d Part of the Land, by 32 H. 8. 1. But if Ten't by Kt.'s Service had made a Feoffment to any of his Sons, *bonâ Fide*, for good Consideration, or if the Estate convey'd to such Uses had been determin'd in the Father's Life; or the Land so convey'd, had been afterwards convey'd away in the Father's Life; or if one had made a Feoffment to his middle Son in Tail, Rem'r to his younger Son in Tail, and died, and the Lord had seis'd the Wardship of the eldest Son, and a 3d Part of the Lands, and so the Statute had been once satisfy'd, and then the middle Brother had

died without Issue, during the Minority of the Eldest, by which the Land had remain'd to the Youngest; or if a Grandfather, in the Life of a Father, had given Lands to any of the Father's Sons; or if one had convey'd Lands to any of his collateral Blood who was not his Heir Apparent, or to a Bastard; all these Cases were out of the said Statute. But if the Grandfather had convey'd Lands to the Son after the Father's Death, such Conveyance had been within the Statute.

If one having none but Socage Land, had convey'd it all to such Uses, and then had purchas'd *Capite* Land, *K.* should not have had any of the Socage Land; but if he had made a Devise of the Socage Land, and then had purchas'd *Capite* Land, and died, *K.* should have had the Wardship of a 3d Part of the whole, *for a Devise takes no Effect till the Death of the Devisor.*

79.

If a Male or Female be married *infra annos Nubiles*, he at 14 or after, she at 12 or after, may agree or disagree, and they need not be married again if they then agree, or be divorc'd if they disagree; but they can't disagree before such Age, and if they then agree, they can't after disagree: If one Party be of the Age of Consent, and the other under it, yet when the Party that was under comes to the Age of Consent, either of them may disagree.

If the Lord had once married his Ward, he should not have had a 2d Marriage of him, tho' the Marriage had been dissolv'd *ab initio* by Disagreement, or Pre-contract.

But

But if the Ancestor or Ravisher had married the Heir, and the Marriage had afterwards been dissolv'd, the Lord should have had the Marriage of him. If the Heir *infra annos Nubiles* had been married in his Ancestor's Life-time, yet because he might have disagreed, the Lord might have taken him into his Possession, or have had Ravishment against a Detainer. But if he had agreed at Age of Consent, neither K. nor Lord should have had the Marriage of him.

80.

By the Statute of *Merton* 6. if the Lord disparag'd his Male Ward under 14, he should have lost the Ward, and the whole Profit thereof should have been converted to the Ward's Benefit. The Lord was said to disparage the Heir by marrying him to the Daughter of a Villein, Burgess, one attainted of Felony, to a Bastard, or Alien, one wanting Hand, or Foot, Deform'd, Paralytick, Consumptive, &c. If a Lease were made to *A.* for *L.* Rem'r to *B.* in *T.* and *A.* had surrender'd to *B.* on Condition, and *B.* had died, and his Heir had been disparag'd, and *A.* had enter'd for Condition broken, and died, *B.*'s Heir being still within Age, he should have been out of Ward, for he claim'd as Heir to one and the same Ancestor; but if Lands had descended to him from another Ancestor, he should have been in Ward as to them. If there had been two Jointenants of a Ward, and one of them had disparag'd the Heir, both should have lost the Ward, for the Words of

the Statute are, that all the Profit, &c. shall be converted to the Use of the Heir.

81. It seems that no Action could be brought on this Act, because none was ever brought, for *periculosum existimandum est quod bonorum virorum non comprobatur exempla*. Not that a Statute can be antiquated, but it may be expounded by *non* Use.

82. The Lord should have had the single Value of the Marriage of the Heir, whether he had tender'd to him any Marriage or not, and he should have as much as another had offer'd to him for the same, *bonâ Fide*, or so much as it should be found to be worth by lawful Trial. If the Heir had refus'd the Lord's Tender, and had remain'd unmarried during the Time that he continued in Ward, or if he had married himself before any Tender made to him by the Lord, the Lord should have had but the single Value of the Marriage; but if the Heir had refus'd the Woman tender'd by the Lord, and married another against the Lord's Will, the Lord should have had the double Value of the Marriage, by Force of the said Statute, *cap. 6.*

The Lord had two Remedies for these Values, *viz.* an Action, or Power to detain the Land, but he could make Use of neither of them till the Heir were of Age. Where the Lord held the Land for the single Value, the Profits were not accounted Parcel of the Value, but as a Pledge till the Heir paid it: But where the Lord held the Land for the double Value, the Profits went in Satisfaction thereof, for the Words of the Statute of *Merton*, which gave the

For

Forfeiture, are, *quod Dominus teneat terram, &c. donec inde percipere posset.*

There never was any Forfeiture of the Marriage of an Heir Female: And at Common Law, the Lord could not have holden over her Land after her Age of 14.

Some held by Kt.'s Service, and not by Escuage, as those that held by Castle-guard, viz. to guard some certain Part of the Lord's Castle in Time of War, which drew to the Lord Ward and Marriage. And if the Ten't made Default in guarding the Castle, the Lord might distrein, and recover Satisfaction in Damages; but the Ten't needed not to stir till the Lord gave him Warning that the Enemies were coming; and tho' the Part which he was to defend was certain, yet the Time was not fix'd, as it was in Escuage, and the Ten't should be discharg'd of Castle-guard for the Time that he serv'd K. in the War.

A Man could not hold of one Lord to guard the Castle of another, therefore if the Lord had granted over his Seigniority, the Castle-guard was gone, for the Grantee had not the Castle; so if a Ten't holds by Suit of Court, &c. and the Lord grant over the Services, the Suit is gone, because the Grantee has not the Mannor. But tho' the Castle were ruin'd, the Tenure remain'd.

Anciently all Earls and Barons had Earldoms and Baronies holden of K. *in Capite*, which K. would not suffer to be divided, and by *Magna Charta*, they should pay for Relief the fourth Part of their Revenue; but of later Days they have been made

83.

Vid. *supra*
112.

made without such Earldoms or Baronies, and therefore such are not within that Statute; for as a *Kt.* paid not Relief unless he had a *Kt.*'s Fee, so neither an Earl, &c. as such, unless he had an Earldom, &c.

The Lord could not waive the Wardship, and have Relief in Lieu of it. But the other Lords of whom *K.*'s *Capite* Ward held other Lands, should have Relief, for they could not have the Wardship of him. But in some Case, the Lord might have both Relief and Wardship of the same Heir, as if *A.* had holden two Manors of *B.* by *Kt.*'s Service, and had been disseis'd of one, and Dis's'or had died seis'd thereof, and the Ten't had died seis'd of the other, his Heir being within Age, the Lord should have had the Wardship of that Manor, and if the Heir being of Age had afterwards recover'd the other, he should have had Relief of him for that.

84.

If Land holden by *Kt.*'s Service had descended to the Son from an Ancestor of his Mother's Side, his Father should have had the Marriage of him, and the Lord the Ward of the Land, for the Father alone while he lives shall have the Marriage of his Son being his Heir Apparent or of his Daughter being Heir Apparents so long as she continues so. But an Alien, or one attainted of Felony, &c. can't have this Privilege, because he can't have an Heir Apparent. Nor should the Mother, or any collateral Ancestor, have had the Custody of their Heir Apparent, before the Lord, for tho' they may have an Action of Trespass, quare

quare consanguineum & heredem rapuit,
 yet that lies only against a Stranger, and
 not against Guardian in Chivalry. If there
 had been Lord and Feme Ten't by *Kt.*'s
 Service, and she had made a Feoffment on
 Condition, and had married the Lord, and
 had Issue, and died, and the Issue had en-
 ter'd for a Breach of the Condition, and
 the Lord had seis'd the Land as Guardian,
 and died, his Executors should not have
 had the Ward of the Body of the Heir, for
 the Lord had it not as Lord, but as Fa-
 ther; nor could he waive his Right as Fa-
 ther.

The Lord that had a Wardship in Right
 of his Seigniory, was called Guardian, in
 Right in Chivalry. The Lords Grantee in
 Possession of the Wardship was call'd Guar-
 dian in Deed.

85.

Notwithstanding an Interest in the Body
 of a Man be a Thing that properly lies in
 Grant, yet the Wardship of the Body might
 be granted without Deed, because it was
 an Original Chattel, *i. e. a new Interest in*
a Thing wherein no one had an Estate be-
fore, created by ~~the~~ *without Deed, but*
 the Wardship ~~of an~~ *was*
 not grantable without Deed, because it was
 not an Original Chattel, but deriv'd
 out of the Inheritance of a Thing lying in
 Grant. A Lease ~~made by a Corporation~~
 Aggregate might at Law be assign'd with-
 out Deed, tho' it could not be made with-
 out Deed. For tho' such Corporation can-
 not make an Estate without Deed, yet an
 Estate when made by them has the same
 Proper-

Properties with those of the like Nature made by others.

By 12 Ca. 2. 24. all Tenures by Kt.'s Service, and Socage in Capite are turn'd into common Socage, and discharg'd of Homage, Livery, primer Seisin, Wardship, &c. which were at Law incident to such Tenures, & Aids pur file marrier, & pur faire fitz Chivalier.

And by the said Statute, any Father, tho' he be under the Age of 21 Years, may by Act executed, or by Will in Writing, dispose of the Tuition of his Children so long as they shall be under the Age of 21 Years to such Persons, (except Popish Recusants,) and in such Manner as he shall think fit.

Of Socage.

TENURE in Socage, is where the Tenant holds of his Lord by certain Service, as Fealty and certain Rent, for all Manner of Services. And at this Day every temporal Tenure of a common Person is in Socage. For tho', in a strict Sense, it only signifies that in which the Service of the Plough was originally reserv'd, yet largely taken it comprehends all others that have the like Effects and Incidents; as if a Rose, Rent, or the doing the Duties of an Office were originally reserv'd; and at Law every temporal Tenure of a Subject, that was not Kt.'s Service, was Socage.

86.

Socagium idem est quod Servitium Socæ, i. e. a Plough, and anciently such Tenants ought to come with their Ploughs, for cer-

tain

tain Days in the Year, to plough and sow the Lord's Demesnes, or do other Works of Husbandry. And afterwards such Services were chang'd into annual Rent, and yet the Name of Socage remain'd.

Such Change must be before Time of Memory, for at this Day they can't be changed by Release, Confirmation, or any other Conveyance so long as the Seignioriness remains, and in some Places they still do such Services with their Ploughs to their Lords.

Escuage certain makes Socage. If a Ten't had holden by Homage, Fealty, and Escuage, viz. by an Halfpenny, when Escuage run at 40 s. he was Ten't by Socage.

Vid. supra, 116.

87.

1. Because his Tenure was certain. 2. The Halfpenny was not paid every Time when Escuage was assess'd.

To hold by certain Rent for Castle-guard is Socage, but tho' a Sum in Gross were voluntarily paid for it, the *Kt.*'s Service remain'd; and wherever Ten't ought to do it by himself or another, it was *Kt.*'s Service.

Whenever the Ten't holds of the Lord by Rent, this is Rent-Service, because it is accompanied with some corporal Service, Fealty at least, in Respect whereof the Lord may distrain of common Right.

If Ten't in Socage die, his Heir being under 14, whether he be his Issue or Cousin Male or Female, the next of Blood to the Heir, to whom the Inheritance can't descend, shall (if the Father appoint no other Guardian, as he may do by 12 Ca. 2.

24.)

24.) be Guardian of his Body and Land till his Age of 14, as if the Land descend from the Father, the Mother, or other next Cousin of the Mother's Side shall be Guardian in Socage, & *sic è converso*, where Land descends from the Mother. But the Civil Law appoints him to be Guardian that is to inherit next, which our Law says, is *committere ovem Lupo*.

Co. L. 9c.b.

Guardian in Socage shall take the Profits, and render an Account of them to the Heir, when he comes to the Age of 14, who at that Age may oust the Guardian, and occupy the Land himself. At Law, Executors could not have an Action of Account nor could any but K. have such an Action against them, for Matters of Account lie *so much* in Privy between the Parties, *that those who are Strangers thereto can neither tell what Allowances ought to be made by the one Party, or what might be attedg'd in Discharge of the other*. But by *W. 2. 23.* If the Heir make his Will, (which he may do at his Age of 18.) his Executors shall have an Action of Account against Guardian in Socage, and by *25 E. 3. 5.* Executors of Executors may have such Action, and by *31 Ed. 3. 11.* Administrators, and by *4 & 5 Annæ 16.* an Action of Account lies against the Executors of a Guardian, Bailiff, or Receiver. The Guardian shall be allow'd his reasonable Costs and Expences, in his Account, and if he marry the Heir under 14, he shall account to him or his Executors for the Value of it, tho' he took nothing; unless he marry him to such Marriage

Marriage as is as much in Value as the Marriage of the Heir. If a Ravisher marry the Heir, the Guardian shall have a Writ of Ravishment of Ward against him, (by (a) *the Equity of W. 2. 35.*) and shall recover the Value of the Marriage, and account to the Heir for it.

Co.L. 89.a.
(a) F.N.B.
139.l.

The Grandmother recovering the Heir in a Writ of Ravishment of Ward against the Stepmother's Husband, was bound by Rule of Court, to find Pledges *pro nutritura heredis, & custodia evidentiaryum.*

If the Guardian marry the Heir after 14, he shall not account for it, for the Heir at that Age is out of his Custody.

If a Man die *seis'd* of a Rent Charge, Common, or such like Inheritances which lie not in Tenure, (and dispose not of the Custody of his Child) the Heir may chuse his Guardian; if he be so young that he can make no Choice, it is most fit that his next Cousin to whom the Inheritance can descend, should have the Custody of him, and whoever takes the Rent, &c. is chargeable in Account. But if he have any Socage Land, the Socage Guardian shall take the Rent Charges, &c. into his Custody.

If the younger Brother die *seis'd in T.* leaving Issue under 14, the Elder, not the middle Brother, shall be his Guardian in Socage, for in equal Degree the Law prefers him. But if Ten't *T. have no Brother, or Sister*, and die, leaving Issue under 14, the next Cousin of the Father's or Mother's Side, that first seises the Heir, shall have the Custody of him, *for the Relation*

88.

lation on both Sides is equal, and no Cause appears, wherefore either should be preferred, and he that first takes Care of the Heir, shew himself to be most concern'd for his Interest. But if Donees in Frank-marriage die, their Issue being under 14, the next Cousin of the Part of the Donee that was the Cause of the Gift, (being not inheritable to the Donor's Rev'n,) shall have the Custody. A seis'd of some Lands as Heir to his Father, and of others as Heir to his Mother, dies leaving Issue under 14: The next Cousin of either Side, that first seises the Body of the Heir, shall have the Custody of him, and the next Cousin of the Father's Part shall enter into the Lands of the Mother's Part, & sic è converso. If a Brother purchase Land in Fee, and die without Issue and the Land descend to the younger Brother, being under 14, Q. who shall be his Guardian in Socage, seeing whoever is of the Blood of the younger Brother, must also be of the Blood of the Elder, and consequently capable of Inheriting.

Register
162. a.

If A. be Guardian in Socage of B. under 14, he shall be Guardian in Socage of another Infant whom B. ought to be Guardian of as being his next Cousin, per Cause d'assign, and an Action of Account lies against him.

An Infant, Idiot, Lunatick, non compos, one Blind and Dumb, Deaf and Dumb, or Leper removed, can't be Socage Guardian. Nor any to whom the Inheritance may possibly descend, therefore the Elder Brother of the half Blood shall not be Guardian in

Socage

Socage to the younger Brother being Heir to the Father of *Burgh English* Lands.

The Father being Guardian in Socage, shall account with the Son for the Profits, or otherwise it would be more for the Son's Advantage to have another for his Guardian than his Father; but where the Father had the Custody of the Body of his Heir Apparent in Respect of his natural Right, he should render no Account to the Heir, for what the Father might receive on such Account, would otherwise have belong'd not to the Heir, but to the Guardian in Kt.'s Service.

Vid. supra.
131.

Guardians are either by Common Law, Statute, or Custom.

By Common Law, there are four Kinds of Guardians, viz. Guardian in Chivalry, Socage, Nature, and Nurture.

There are two Kinds of Guardians by Statute. 1. By 3 & 4 Ph. & M. 8. the Father, or Mother, (after the Father's Death) or any other appointed by the Father by his last Will or Act in his Life, shall have the Custody of Female Children under the Age of 16, and no one shall take them away without Consent of such Persons, under severe Penalties in the said Act mention'd, and by 12 Ca. 2. 24. Fathers may appoint Guardians for any of their Children.

Vid. supra.
132.

3. There are also Guardians by Custom, of Orphans by the Custom of the City of London.

Guardianship in Socage is not forfeited by Attainder, nor shall Husband of Guardian

89.

dian in Socage have the Guardianship by a Survivor; for such Guardians have nothing to their own Benefit, but are only intrusted to manage the Land of the Heir, for his Benefit, with that Affection which cannot be expected from Strangers. Guardian in Socage cannot present to a Benefice, because he cannot account for it, and if he should have Power to present, he might be tempted to make an Advantage of it. But some (a) have said, that if the Heir be within the Age of Discretion, the Guardian may present.

Vid. sup 25.

(a) 2 Cro. 99.

2 Cro 99.

Those Words of the Statute of Marlbridge 17, that the Guardian shall answer the Heir *cum ad Legitimam Aetatem pervenerit*, are understood *secundum subjectam materiam* of his Age of 14, for that is his lawful Age as to this Purpose. Neither Marlbridge 23, which gives a *Capias* in Account against Bailiffs, nor W. 2. 11 which appoints Auditors to take Account of Bailiffs, &c. extend to Guardian in Socage.

If a Guardian in Socage, Bailiff, Receiver, or Factor, be robb'd without their Default, they shall be discharg'd so far of their Account; so shall not a Carrier, for he has his Hire. If one take Goods to be safely kept, or to be kept for another, and be robb'd he shall answer for them. But the Contrary has been of late resolv'd, for it seems unreasonable that he who, without any Gratitude, does a friendly Office to another, and is in no Default, should be a Sufferer for his Kindness. If Goods pledged

hip be a Man be stol'n from him, he shall not
 nothing answer for them, for he had a *special Pro-*
*trust*erty in them, and can't be suspected of
 for his Want of taking Care of them; but if he
 cannot had refus'd to let them be redeem'd, he
 dian in should have answer'd for them. If *A.* leave
 e, be Chest with *B.* and take away the Key,
 d if he and acquaint not *B.* with what is in it, and
 ight be the Chest be stol'n, *B.* shall not be charg'd,
 . But because *A.* did not trust him with it, as
 heir be his Case is.

ardian Whoever occupies the Heirs Land, as So-
 age Guardian, shall render an Account to
 Mark the Heir, and it is no Plea in such Action
 answer to say that he is not Prochein Amy. If
 m per Guardian in Socage occupy the Land from
 subject the Heir's Age of 14 till 21, he shall be
 t is his afterwards charg'd as Bailiff, not as Guar-
 Neither dian.

bias is On the Death of Guardian by *Kt.*'s Ser-
 2. in vice, the Executors should have had the
 count Wardship of the Heir, but not the Execu-
 dian in tors of Guardian in Socage, but the next
 Friend of the Heir shall have the Ward of
 Recee him, for the Guardian in Chivalry had the
 heir De Wardship to his own Use, but the Guar-
 far of dian in Socage has it to the Use of the
 er, for Heir. A Bishop's Executors should have
 s to be had a *Kt.*'s Service Ward, which he had in
 r, and Right of his Bishoprick, tho' he had dy'd
 But before Seisure, for he had an Interest vest-
 for a ed in him. If a Bishop die before he has
 bout a fill'd up an Avoidance of a Church, *K.* shall
 ro and present; so if a Man had holden an Ad-
 a Sug vovson of *K.* by *Kt.*'s Service, and the
 edged Church had become void, and he had died,
 his

his Heir being within Age; *for the Right of presenting to a void Church is in Nature of a Chose in Action, and is rather a Trust than an Interest*, but where the Tenure is of a Subject, the Executors shall present. *For tho' the Law make such a Construction in Favour of K. who is always presum'd to act with the greatest Honour, yet all Subjects stand in equal Degree.*

91.

Every Ten't in Socage, and every Ten't by Kt.'s Service (*before 12 Car. 2. 24.*) was bound to give the Lord Aid for the making of his eldest Son a Knight, at the Age of 15 Years, and for marrying of his Daughter at the Age of 7.

After the Death of Ten't in Socage, his Heir, of what Age soever he be, shall pay to the Lord for Relief as much as the annual Rent amounts to, whether it were reserv'd in Money, or any other Thing of *English* or Foreign Growth, or Manufacture; and if he hold by ten Shillings payable every 2 or 3 Years, he shall pay ten Shillings for Relief: And it is due to the Lord presently, and he may distrain for it forthwith after the Death of the Ten't.

If the Ten't hold by the Rent of ten Shillings or a Pair of Spurs, he may pay which of them he will for Rent, and so may his Heir for Relief. But if the Ten't be not ready to pay one or the other when he ought for Rent, or if the Heir be not ready upon the Land presently, (*i. e.* as soon as conveniently he may) after the Death of his Ancestor, to pay the one or the other for Relief, the Lord may distrain

to

for which of them he pleases. But if either of them be tender'd according to Law, and there be none on the Lord's Part ready to receive it, the Lord can afterwards distrain for that only which was tender'd, but for that he may distrain whenever he pleases.

If the Ten't hold by the Rent of ten Shillings, or doing so many Days Work at Harvest, or attending on the Lord at *Christmas*, ten Shillings must be paid for Relief, for of Corporal Work or Labour no Relief is due. *Yet it has been said, that the Service of doing so many Days Work at Harvest may be doubled, for it is not personal to the Ten't, but may be done by himself or another, and no particular Time is prescribed for the doing of it, but only that it be done within Harvest; but it is impossible to double the Ten'ts Attendance on his Lord at Christmas, &c.*

2 Roll. A.
515.

If the Ten't hold of his Lord by a Rose, or such like perishing Fruits of the Earth, which can't be kept, and die at a Time when they are not ripe, the Lord can't distrain for his Relief before the Time when by the Course of Nature they may be ripe, *Lex enim spectat naturæ ordinem.*

92.

Tho' the Ten't doing Fealty swear to do to the Lord all Manner of Services due, yet one may hold by Fealty only for all Manner of Services, and in that Case, when he has done it, no other Service is due: For every Ten't ought to do some Service to his Lord, lest in Time it should be forgotten that he holds of him, and so the

Lord

Lord might lose his Escheats, Forfeitures &c. And inasmuch as Fealty is incident to every temporal Tenure, and the Lord at first would have no other Service, it is Reason that he should have that.

93.

Every Lessee *L.* or *T.* shall do Fealty to the Lessor for they hold of him, and there can be no Tenure without some Service, because the Service makes the Tenure, but bare Ten't at Will shall not do Fealty for he has no certain Estate.

Of Frankalmoine.

TENANT in Frankalmoine, is where an Ecclesiastical Corporation, whether Regular, or Secular, Sole or Aggregate, holds in Frankalmoine that is to say in *Latin*, in libera *Eleemosynâ*: Those Ecclesiastical Persons were called Regular, that lived under certain Rules, and had vow'd true Obedience, wilful Poverty, and perpetual Chastity. Others for Distinction-sake were called Secular, as Bishops, &c.

94.

England's Ecclesiastical State is divided into two Provinces, or Arch-Bishopricks. The Arch-Bishop of *Canterbury* is stiled *Metropolitanus*, & *Primas totius Angliæ*. The Arch-Bishop of *York*, *Primas Angliæ*. The First has under him *Rocheſter* his principal Chaplain, *London* his Dean, *Wincheſter* his Chancellor, and all the others except *York*, *Cheſter*, *Durham*, *Carlisle* and *Man*. And every Arch-Bishop, and Bishop, has his Dean and Chapter.

Every

Every Diocese is divided in Arch-Deanries, whereof there be 60, these into Deanries, Deanries into Parishes.

Anciently a Man could not alien Land which he had by Descent, but only to God in Frankalmoine, or to one of his Blood in Frankmarriage, or to a Servant in *Remuneratione Servitii*.

Tho' the Covent were dead in Law, and could only assent unto Acts done to or by the Abbot, yet a Feoffment made to an Abbot and Covent and their Successors was good, and the Fee vested in the Abbot. Abbots and Bishops might, at Law, take a Fee without Deed, and by the Word Frank or Pure Alms, without the Word Successors; but a Corporation Aggregate of many Persons capable could never take without Deed, tho' they may without the Word Successors. Vid. Sup. 15.

A Chapter, in Latin *Capitulum*, in a large Sense signifies any Body of Ecclesiasticks, Regular or Secular, whose Assent is required to the Acts of a Superior, but strictly it signifies *Clericorum Congregatio sub uno Decano in Ecclesiâ Cathedrali*. 95.
Co. L. 32 B.
and of this Sort some are ancient, others later. The later are twofold, first those translated by Henry 8. in the Place of Abbots and Covents, or Priors and Covents, which were Chapters while they stood. Secondly, Those founded by Henry 8. for new Bishopricks. The ancient Deans come in by *Congé d'Elire*, and the King giving his Royal Assent, are confirm'd by the Bishop; those newly translated, or
H founded,

founded, are Donative, and by the King's Letters Patents are installed.

None can take a Fee in Frankalmoine but Ecclesiastical Persons being Bodies Politick, as Bishop, Parson, &c. or Incorporated by Letters Patents, or Prescription.

Ten'ts in Frankalmoine were bound of Right to make Prayers for the Souls of their Founders or Grantors, and their Heirs which were dead, and the Prosperity of those which were alive, and the Law esteemed such spiritual Services to be better for the Lords than the doing of any temporal Services; and for this Cause and because the Word Frankalmoine excluded all temporal Services, Ten'ts in Frankalmoine are not bound to do Fealty.

They were said to be bound of Right to do such spiritual Services, because the Ecclesiastical Law compelled them to do them for Want of Remedy and Want of Right in all one. But late Statutes having altered the Manner of Celebration of divine Service, if the Ten't do what is now authorized, it is sufficient whether he hold in Frankalmoine or by particular divine Service, and if he held in Frankalmoine before, he holds in Frankalmoine still, for that was the original Tenure, and every one is Party, and presumed to consent to an Act of Parliament.

If Ten'ts in Frankalmoine neglected to perform such Masses, &c. they could not be distressed for such Default, for every Distress must be for something certain; but

King's Frankalmoine, nothing in certain is reserved; and in Avowry, Damages cannot be recovered for what is neither Certain, nor can be reduced to Certainty, for *oportet quod certares deducatur in iudicium*; but to hold by Shearing all the Lord's Sheep depasturing in the Lord's Manor, is certain enough by Reference to the Manor, which is certain.

But the Lord ought to complain of such Default to the Ordinary, or to the Visiter, (if any were appointed by the Foundation,) and they ought to punish the Fault, and provide against it for the future. Where the K. is Founder, regularly the Ordinary shall not be Visiter, but the Lord Chancellor, unless a special Visiter be appointed in the Foundation.

There are two Jurisdictions in England, one of which is Ecclesiastical, limited to spiritual and particular Cases, which has Consuance of Matters where the Right is spiritual, and there is Remedy only by that Law. The other is Temporal and Secular, and guided by the General and Common Law.

If the spiritual Tenure be by certain divine Service especially express'd, as to chant Mass every Friday, or to give 100 Pence such a Day in Alms; this is not Frankalmoine, for in that nothing certain is mentioned, but this is called Tenure by divine service, and he that holds by it shall do Fealty, and if the Service be neglected the Lord shall distrein, and in his Avowry recover Damages, and if Issue be taken on the

Performance of it, the Jury shall try it, inasmuch as the Service is certain, tho' it be Spiritual, and wherever Common or Statute Law gives Remedy *in foro Seculari*, the Cognisance belongs to the King's temporal Courts, whether the Matter be Spiritual or Temporal, unless the same Statute, which gives a Remedy in the Temporal Court, save the Jurisdiction of the Ecclesiastical Courts.

97.

Fealty is incident to all Services, for which the Lord may distrein.

Tenure in Frankalmoine is so free, that, as it is said, a Rent reserv'd on a Gift of Land to hold by such Tenure is void; and no one that holds by it can be charged with a Corody; and Land so holden, can't be ancient Demesne in respect of the Charges incident thereto; and if any Certainty were reserved on the original Grant, the Tenure is not Frankalmoine.

There were 118 Monasteries founded by Kings of *England*, whereof such Abbots and Priors as were founded to hold *per Baroniam*, and called by Writ to Parliament were Lords of Parliament: Of these there were 27 Abbots, and 2 Priors. The Abbot of *Feversham*, tho' he held by Barony, yet never sat in Parliament, because he was never called by Writ. All *English* Bishops were originally founded by the Kings of *England*, to hold by Barony, and have been called by Writ to Parliament. The Bishops of *Wales* were founded by the Princes of *Wales*, who held of the King as of his Crown, and when the said Princes of *Wales*

forfeited their Principalities, the Patronages of them were annex'd to the Crown of England, and the said Bishops have been call'd by Writ to Parliament, and are chargeable with Pensions and Corodies.

Ten't in Frankalmoine shall do no Fealty, as is aforesaid, in respect of the spiritual Service that he is bound to perform, but Ten't in Frankmarriage shall do it till the fourth Degree be pass'd, and the Alience of Ten't in Frankalmoine shall do Fealty, for if they should do no Service, the Land would be holden of no Man; for avoiding of which Inconvenience the Law creates the Service of Fealty, which is the lowest that can be, and incident to every Tenure except Frankalmoine.

Since the Statute of *quia Emptores*, if a Grant be made to hold in Frankalmoine, these Words in Frankalmoine are void, for one can hold of Frankalmoine of none but the Donor, but by that Statute no Man can give Lands in Fee to hold of himself; therefore at this Day, if Land be given to hold in Frankalmoine, with a Dispensation of the Statutes of Mortmain, (which ought to have been made by K. and all the Lords-mediate and immediate, *but now by 7 & 8 Gul. 3. 37. it may be granted by K. alone of whomsoever the Lands are holden.*) Yet the Feoffee shall hold of the same Lord of whom the Feoffor held by the same Services. So that none can hold in Frankalmoine but by Prescription, or by Force of a Grant made before that Statute to hold in Frankalmoine, or made since the Statute by the

99.

Litt. Sect.
340.

King, (who is not restrained by it,) or by a Subject licensed by the King, and all the Lords mediate and immediate, to make such Grant, for *alienatio licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri, & quilibet potest renunciare juri pro se introducto*. And if a Lord confirm the Estate of a Parson, to hold of him in Frankalmoine, such Confirmation changes the Tenure by which he held before, into Frankalmoine, and is not within the Statute of *quia Emptores*, but remains as it was at Common Law, and is good, because no new Service is reserved by it to the Lord, but only that the Parson shall hold of him, which he did before.

If the King license to alien to an Ecclesiastical Person, there is no Need of a *non Obstante* of the Statutes of Mortmain, for where it is the express Purport of the King's Grant to enable a Man to do a Thing which is prohibited, it shall not be said that the King knew not of the Prohibition; but such Licence does not dispence with the Statute of *quia emptores Terrarum*, unless it be expressly mentioned.

The Words of the Statute of *quia Emptores* are *Dominus Rex in Parlamento, &c. ad instantiam magnatum Regni sui concessit*, which being in an ancient Statute, are as effectual as *Authoritate Parliamenti concessit, &c.* And being entred on the Parliament Rolls, it shall be intended that the King, Lords, and Commons assented: And the said Statute being a general Law, the Judges shall determine whether it be a Statute or no.

The

The Tenure in Frankalmoine is so appropriated to the Grantor and his Heirs, or Successors, that, like the Foundership of a House of Religion, Tenure by Homage Ancestrel, or the Privilege of bringing a Writ of *Contra formam Fecffamenti*, or *Collationis*, it cannot be transferred to any other. Therefore if the Mesne, of whom the Tenant holds in Frankalmoine, die without Heir, (by Reason whereof the Mesnalty Escheats, and drowns the Seigniorie Paramount,) the Ten't shall hold of the Lord Paramount by Fealty only, *for such Lord coming into the Place of Mesne, can claim no Services that were not due to him, except Fealty, which is incident to every Tenure*, but such Lord shall hold of his Lord Paramount by the same Services by which he held of him before, *for the Privity between them is not changed*. If such Mesne release to his Ten't in Frankalmoine, he thereby extinguishes the Mesnalty, and the Ten't shall hold of the Lord Paramount by Fealty. *And Q. in this Case, if he shall not hold also by the other Services by which the Mesne held for it seems unreasonable that the Lord Paramount should be prejudiced by the Act of his Ten't.*

A Man can't reserve a Rent to his Heirs, excluding himself; for in his Life-time they can't take, nor can they take that by Descent from him which he had not himself. Therefore if one have granted Land in Fee, before the Statute of *quia Emptores*, to hold of his Heirs, such Reservation had been void, and the Ten't should have holden of the Grantor, by the same Services by which

(a) 2 Rolls
Ap. 447.

he held over. And at this Day, if a Man make a Gift in Tail reserving a Rent to his Heirs, the Reservation is void, (a) and the Donee shall hold of the Donor, by the same Services by which he holds over.

100.

As the Ten't in Frankalmoine is bound to do such divine Service as the Law requires, so is the Lord in Consideration thereof bound to acquit him, i. e. to keep him quiet from Entries, and Molestations, for any Services issuing out of the Land to any Lord above the Mesne. But he is not bound to acquit him of Suit real to a Leet, Torn, or Hundred, for that is not due from one as Ten't, but as Resident in such a Jurisdiction.

(b) Litt.
Sect. 144.

One may be bound to Acquittal three Ways. 1. By Deed. 2. By Prescription. 3. By Tenure. And by Tenure five Ways. 1. By Owelty of Services. 2. By Tenure in Frankalmoine. 3. By Tenure in Frankmarriage. 4. By Tenure by Reason of Dower. 5. By (b) Tenure by Homage Ancestrel.

If such Ten't be distrein'd by a Lord Paramount, the Mesne may put his own Beasts into the Pound instead of the Ten't's.

A Man may have 6 Writs, *quia Timet*, before any Distress, Molestation, or Impleading. 1. A Writ of Mesne. 2. A *Warrantia Chartæ*. 3. An *Audita Querela*. 4. A *Monstraverunt*. 5. A *Ne injuste Vexes*. 6. A *Curia Claudendâ*.

The Process in a Writ of Mesne, at Common Law, is Summons, Attachment, and Distress

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Distress infinite, in the County where the Writ is brought. And the Plaintiff shall have Judgment to recover his Acquittal, and if he be distress'd, or damnified, his Damages and Costs. And the Plaintiff in a Writ of Mesne may still chuse such Process, or the Process given by *W. 2*.

By Force of *W. 2* the Mesne shall be forejudged of his Mesnalty, in two Cases. 1. If he do not appear upon the Process given by that Statute. 2. If he suffer the Ten't, after he has recovered his Acquittal, to be distress'd a second Time.

A Fore-judgment against Baron and Feme, or against a Ten't in Tail, shall bind the Wife, or Issue till they reverse it in a Writ of Error.

The Words of the Judgment by which the Mesne is fore-judged are to this Effect, That the Mesne shall lose the Services of the Ten't, and that the Ten't shall hold of the Lord Paramount by the same Services by which the Mesne held. Therefore if two Jointenants bring a Writ of Mesne, and one of them be summon'd and sever'd, the other can't forejudge the Mesne, for he alone can't be Attendant to the Lord Paramount as the Mesne was. And if there be two Jointenants Mesnes, and one make Default, and the other appear, there can be no Fore-judgment, *for the Mesnalty continuing in him that made no Default, the Ten't can't hold by the same Services by which both the Mesnes held.*

The Fore-judgment of a Mesne who is a Dis'sor shall not bind his Dis'see; so neither shall a Fore-judgment of a Ten't being a Dis'sor, bind his Dis'see.

The Fore-judgment of a Daughter binds the Son in *Venter sa mere* born after, and the Fore-judgment of the Heir of a Man profess'd did bind the Ancestor being afterwards deraign'd, for in both Cases the Person fore-judged alone had Right at the Time.

A Bishop, &c. can't be forejud'd, for he alone can't prejudice the Church.

There must be but one Mesne between the Lord distraining, and the Tenant distrained, by the exprefs Words of the Act.

Of Homage Ancestrel.

201.

TENURE by Homage Ancestrel was where the Ten't held by Homage, and he and his Ancestors had Time out of Mind holden of the Lord and his Ancestors or Predecessors by Homage, and done Homage to them. And the Lord that had received Homage of such a Ten't, was bound to warrant him when impleaded of Land so holden. And such Ten't was not bound to attorn to the Lord's Grantee in a *per quæ Servitia*, unless the Conusee would grant to warrant the Land to him. And there was a Writ *de Homagio capiendo* to compel the Lord to receive the Homage of such Ten't for the Benefit of his Warranty.

Such

Such Tenure likewise bound the Lord to Acquittal.

If the Lord being vouch'd by Force of such Tenure, had demanded what the Ten't had to bind him to Warranty, and the Ten't had shewn that the Land was holden by Homage Ancestrel, &c. if the Lord had never received Homage of the Ten't, or his Ancestors, he might have disclaim'd in the Seigniori, and ousted the Ten't of the Warranty, and by such Disclaimer the Seigniori was extinct, and the Ten't held of the next Lord. But he that had receiv'd Homage could not disclaim. And a Tenant in Frankalmoine is so much favour'd, that the Lord in a Writ of Mesne brought by such Tenant can't disclaim.

Voucher, in Latin *Vocatio*, is when the Ten't calls another into Court that is bound to warrant the Land, *i. e.* either to defend the Right against the Demandant, or yield other Land in Value. It can be only us'd in Actions wherein a Freehold or Inheritance is demanded, except only in a Writ of Ward, in which tho' a Chattel were only demanded, yet the Tenure of the Inheritance, which is in the Realty, was the Ground of the Action. But no Voucher lies on the Grant of any other Chattel with Warranty, but an Action of Covenant, if it were granted with Deed; if without Deed, Case, or Deceit.

The first Process in Voucher is a Summons *ad Warrantizandum*. And if the Vouchee be summon'd, and make Default,
a Mag-

102.

(4) Co. L.
393. a.

a *Magnum Cape ad Valentiam* shall be awarded; and then if the Vouchee make Default again, Judgment shall be given against the Ten't, and for him to have in Value against the Vouchee. If the Vouchee appear, and after make Default, a *Parvum Cape ad Valentiam* shall be awarded; and if he make Default again, the same Judgment shall be given as before. If the Sheriff return that the Vouchee hath nothing, then after an *Alias & Pluries*, a *Sequatur sub suo periculo* shall go, whereon if the Sheriff make the like Return, the Demandant shall have Judgment against the Ten't, but the Ten't shall not have Judgment against the Vouchee, for he was never warn'd, and it appears that he has nothing. And after such Judgment the Ten't may have a *Warrantia Carte*, or vouch again; but where he hath had Judgment to recover in Value, he shall never vouch again, (a) if by such Judgment he had full Benefit of the Warranty.

Foreign Voucher is when one impleaded in a particular Jurisdiction, vouches and prays that the Vouchee may be summon'd in some other County, out of such Jurisdiction.

The Civil Law binds every Man to warrant what he sells, but the Common Law does not without a Warranty in Deed, or Law, for the Rule is, *Caveat Emptor*.

In Voucher by Force of Homage Ancestrel, the Land which the Lord had at the Time of the Voucher, by Purchase, or Descent,

scnt should be charg'd; for it could not be known whether he had any from him that created the Seigniory, because it had lasted Time out of Mind, and it was not the Grant of any Ancestor, but the Continuance of the Privy between each Family, Time out of Mind, which created the Warranty. But an Heir shall be charg'd, by an expresse Warranty, only for such Land as he has by Descent from him that created it; and an Heir shall be charg'd in a Writ of Annuity, only in Respect of those Lands which he has by Descent from the Grantor, and for this Reason a Writ of Annuity will not lie against him by Prescription.

Warrantia Cartæ binds the Land from the Time of the Writ, but Voucher binds it only from the Time of the Voucher. A Judgment in an Action of Debt against an Heir binds the Land descended from the Time of the Writ, for the Action was brought in Respect of such Land; but a Judgment for ones own Debt binds the Land from the Time of the Judgment only, for such Action is brought in Respect of the Person, and not of the Land. Issues return'd on a Juror shall be levied on the Feoffee, tho' they were lost before the Feoffment, for the Juror was return'd in Respect of the Freehold: but where the Plaintiff is nonsuit, the Land which he had at the Time of the Amerciament only shall be charg'd, not what he had at the Time of finding the Pledges, for he is amerced for a personal Default, and not in Respect of his Land; *but in the Case of the Juror*
the

the Land is charged with the Issues by the Sheriff's Return, and cannot be discharged but by the Appearance of the Ten't.

If the Feoffor bind special Land to Warranty, his Person is hereby bound, but not the Land, unless he have it at the Time of the Voucher.

A Body Politick can't hold by Homage Ancestrel, but Land might be so holden of a Body Politick, provided the Tenure continued in the Blood of the Ten'ts, and the Privy of Succession continued in the same Body Politick, and if a Prior and Convent had been translated to a Dean and Chapter, the Ten'ts that held of them by such Tenure before, held still by the same, for the Body was never dissolv'd, but in Effect remain'd.

103.

5 Rep. 14. b.

No Sole Corporation, or Head of a Corporation Aggregate of many Persons dead in Law, can disclaim, for the Law would never trust one single Person with the Power of disposing of the Inheritance of his House. But if an Abbot or Prior had disclaim'd in a *Quo Warranto* brought by K. this should have bound their Successors; so should their Confession of the Action in a Writ of Annuity, because it can't be falsify'd by an higher Action; and a Recovery in a real Action against them, or a Fine levy'd by them bound the Successors, till they had avoided it in a Writ of Right.

If an Abbot, &c. had suffer'd Judgment in an Action of Debt, or acknowledged a Statute,

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Statute, or Recognizance, with Consent of the Covent, or without, the Successor could not have avoided Execution, because it was but a Chattel.

Vid. 43.
El. 9.

If such Ten't had alien'd, his Alienee should not have holden by Homage Ancestrel, nor should the Alienor himself, if he had after taken back a State in Fee, for the uninterrupted Continuance of the Privy in the Blood of the Ten't was dissolv'd by the Alienation. So if such Ten't had made a Feoffment on Condition, and re-entred for a Breach, he should not have holden by Homage Ancestrel again. As if *cestuyque* Use had made a Feoffment on Condition before 27 H. 8. and re-enter'd for a Breach he should have detain'd the Land against the Feoffees, for the whole Estate and Privy was for the Time taken out of them, and thereby dissolv'd for ever. If a Ten't by Homage Ancestrel were vouch'd by his Alienee, yet could he not vouch the Lord, for notwithstanding the Vouchee comes in in Privy of his former Estate, as to many Purposes, yet such Vouchee could not come in as Ten't by Homage Ancestrel, as to this Purpose, because by the Alienation the Privy between him and the Lord was discontinued. But if such Ten't had made a Gift in T. or lease L. he might have vouch'd the Lord, in Respect of the Rev'n, which he held of him by the same Tenure by which he held the Land in Possession. And if he had lost the Land in a false or feign'd Action, yet the Privy remain'd.

The

104.

The Ten't who had once done Homage was not compellable to do it again to any Heir, or Alienee of the Lord; but Fealty is incident to every Attornment. If the Lord had been seisd in Tail, and discontinued, and taken back a State in Fee, and receiv'd Homage, and died, his Issue being remitted to the State *T.* might have compell'd the Ten't to have done Homage to him, because the Remitter defeated the Estate in Fee, in Respect whereof the Father receiv'd the Homage. If the Ten't had alien'd all his Land holden by Homage, he was not afterwards compellable to do Homage, but the Alienee was, whether the Alienor had done it or no. And if the Ten't had holden of the Lord as of a Manor, and had done Homage to the Lord, and afterwards the Manor had been recover'd from the Lord by Title or Pretence of Title, the Ten't was compellable to do it again to the Recoverer, for the Estate of him that receiv'd it was defeated by the Recovery, and a Ten't can't falsify a Recovery against his Lord. But the Recoverers in a common Recovery, which is by Consent, and is a common Assurance, whereon an Use may be limited, had no Remedy to distrain for Homage, &c. without Attornment of the Ten't, before 7 *H.* 8. 4. which gives them the same Remedy the Recoverers should have had: Therefore if one make a Lease *T.* to begin at *Michaelmas*, reserving Rent, and before *Michaelmas* suffer such a Recovery, the Recoverers may distrain for it, because the Recoverers might have done

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so if they had not suffer'd it; but if the Conusee of a Fine had suffer'd such a Recovery of a Manor before the Ten'ts had attorn'd, the Recoverers could not distrain, because the Conusee himself could not, before 4 & 5 Annæ 16. And such Recoverers could not have an Action of Debt, or of Waste, against the Lessee, before 21 H. 8. 15. which gives them such Actions.

If the Ten't had offered to do Homage to his Lord, and he had refus'd to accept it, he should not afterwards have distrain'd him for it, unless he had first required it, and the Ten't had refused it.

He that ought to do Homage, or Fealty, must seek the Lord if he be in *England*; but it is sufficient to tender Rent upon the Land.

By 12 Ca. 2. 24. *Tenure by Homage is taken away, and consequently Tenure by Homage Ancestrel.*

Of Grand Serjeanty.

TENURE by Grand Serjeanty, is where a Man holds of the King by such Services as he ought to perform in proper Person to the King, as to carry his Lance, to be Marshal, Constable, or Chamberlain of *England*, or by any Office concerning the King's Treasury, or Administration of Justice.

One held *per Serjeantiam ad invenien- dum unum hominem ad guerram ubicunque infra 4 Maria*; this was Grand Serjeanty, because it was to be done by the Body of a Man,

105.

106.

107. Man, and if he could not find another to do it, he was bound to do it himself.

To hold of *K.* by Cornage, *i. e.* to blow a Horn to give Warning of the Enemies coming into *England*, was Grand Serjeanty; to hold by it of a Subject, was *Kt.'s* Service.

Ten't by Grand Serjeanty was never bound to pay Escuage, or Aid *purfaite fits Chivalier, &c.* So that 12 Ca. 2. 24. is declarative as to this Point. His Relief is a whole Year's Value of his Land, over and above all Charges and Reprises, whereas Ten't by Escuage paid but the 4th Part. Ten't by Escuage ought to do his Service out of the Realm; these for the most Part within it. None can hold by Serjeanty but of the King. Ten't by Escuage might make his Deputy; but when Ten't by Grand Serjeanty is to perform any high Office of State, or to do any Service to the Person of the King, he can't make a Deputy without Licence: But he that held to serve him in his Wars within the Realm, or by Cornage, might make a Deputy.

At *Ric.* 2d's Coronation, *W.* a Citizen was not admitted to hold the King's Towel, but he did it by the Earl of *C.* his Deputy. One *Furneval* of an ancient Family was first made *Kt.* and then supported the King's right Hand. *Anne* Countess of *P.* who held by such like Service, was adjudged to do it by Deputy, because a Woman can't do it in Person. And *John* Earl of *P.* being under Age, and in the King's Custody, the King appointed

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appointed one to perform such Service in his Room.

Ten't by Grand Serjeanty was said to hold by *Kr.*'s Service, because the King had Ward and Marriage of such Ten't; and tho' these are taken away by 12 Ca. 2. 24. yet the honorary Services of Grand Serjeanty still remains.

Of Petit Serjeanty.

PETIT Serjeanty, is when one holds of the King by rendring yearly a Sword, or Bow, or such other Things touching the Wars, and this is Socage in Effect, because such Ten't is not bound to do any Thing in his proper Person touching the War.

108.

All grand and petit Serjeanty is *in Capite*: viz. holden of the King as of his Crown; but he that holds of him as of an Honour, or as of his Person, (as when a Tenure in gross Escheats to *K.*) holds not *in Capite*; for no Tenure can be *in Capite*, but what was originally created by the King. An Honour is the most noble Seignior, as being originally created by *K.* yet it may be granted to others.

Of Tenure in Burgage.

TENURE in Burgage, is where there is an ancient Burgh, the Tenements whereof are holden of the Lord, whether *K.* or other Lord, Spiritual or Temporal, by certain Rent, and such Tenure is but Socage. A Burgh is an ancient Town that sends Members

109.

Members to Parliament. It was anciently taken for those Companies of 10 Families that were one another's Pledges, from the Saxon Word *Borhoe*, a Pledge, whence came Headborough, &c. A City is a Burgh incorporate, that has, or has had a Bishop; and tho' the Bishoprick be dissolved, yet the City remains. Every City is not a County, for it may be Part of the County in which it is.

110.

Parliament so called *a Parler la ment*, was, before the Conquest, called the great Court, or Meeting of the King and all the wise Men. The King has divers Councils. 1. The Parliament, called *Commune Concilium*. 2. *Magnum Concilium*, the Lords in Parliament, or out of Parliament. 3. His Privy-Council, for Matters of State. 4. His Judges of the Law, for Law Matters.

For the greater Part, such Boroughs have Customs and Usages, which others have not; some have this Custom, that the youngest Son shall inherit all his Father's Tenements within the Borough, whether he were seisd in Fee-Simple, or Fee-Tail, or of a Freehold descendible, as Heir to his Father, which is called Borough *English*.

A Custom of devising Lands, Borough *English*, or Gavelkind, may be alledged in a City, Borough, or Manor, but not in an upland Town that is neither City nor Borough. But a Custom to have a Way to the Church, and to make By-Laws for the Reparation of the Church, and well Ordering of the Commons, and such like Things, may be alledged in an upland Town, that is neither City nor Borough.

Vid. supra.
49.

By Custom of some Burghs the Wife shall have Frank-Bank, *i. e.* shall be endowed of all her Husband's Tenements; in some she shall have the Whole, or Half, *adum sola*, or *casta vixerit*. In Gavelkind the Husband shall be Ten't by Courtesy, whether he has had Issue by his Wife or not.

By the Custom of some Boroughs one may devise Lands and Tenements within them, and thereby prevent the Descent thereof to his Heir. And the Devisee may enter after his Death, and he has the Freehold and Interest in Law in him before he enters, nor does he want the Executor's Consent, as a Devisee of Chattels real or Personal does. If he be holden out, he may enter, or have the Writ *Ex gravi querela*, but this lies not after actual Possession; but it is incident to the Custom to devise, for otherwise a Descent cast before the Entry of the Devisee would put him without Remedy. But *Quære of this Reason, for it is said,* Bro. Affise, Co. Lit. 240. b. *That a Descent takes not away Entry of a Devisee, (claiming as it seems by the Statute of Wills) because it is his only Remedy, and why may not the same Rule be apply'd to Devisee claiming by Custom?* By some Custom, Land might pass by Will nuncupative, as well as by Writing, but this is restrained by the 29 Ca. 2. 3.

The Writ *Ex gravi querela* thus expresses the Custom to devise Lands, *Quod liceat unicuique civi sive Burgenfi ejusdem Civitatis sive Burgi Tenementa sua in eadem*

III.

Bro. Affise,
354.

dem. civitate five Burgo in Testamento suo in ultimâ voluntate sua tanquam catalla sua legare cuicunque voluerit. By such Custom he may devise a Rent out of his Land, but not Land intailed.

Vid. *supra*,
120, 126.

By 32 H. 8. 1. Lands holden in Socage are generally devisable by Will in Writing: But before *Kt.*'s Service was abolish'd, a Devise was void as to the third Part of *Kt.*'s Service Land, and the Third of the Whole, whether Socage, or *Kt.*'s Service Land belonging to the King's Ten't by *Kt.*'s Service *in Capite*. But a Devise of *Kt.*'s Service Land might by Custom be good for the Whole, for this Statute being in the Affirmative, took not away the Custom of devising Lands. If one had conveyed Part of his *Kt.*'s Service Land to the Use of his Wife, or Children, or Payment of his Debts, he could have devised no more of the Residue than would have made two full 3d Parts of the Whole: And if he had convey'd two full 3d Parts to such Uses, he could not have made any Devise, except of the Rev'n of those two Parts: But that he might devise, because it was the Intention of the Act that he might dispose entirely of two Parts. Hereditaments of uncertain Value, as Waifes, Estrays, &c. could not be devised as Part of the two Parts, or left to descend as Part of the Third; but if they had been holden of *K.* by *Kt.*'s Service *in Capite*, they restrain'd the Devise of more than of two Parts: So did a Rev'n on a State Tail, tho' it were dry and fruitless. The

Rem'r

Rem'r mention'd in the Act must be understood to be such as drew Ward and Marriage; therefore if a Rev'n holden by *Kt.'s* Service in *Capite* were granted to one for *L.* the Rem'r to another in Fee, the Grantee of the Rem'r was not restrain'd during the Life of the Grantee *L.* but after his Death he was *because then his Heir should have been in Ward, &c.* If a Lease had been made for *L.* Rem'r. in Fee, this Rem'r was not within the Act. If *K.'s* Ten't by *Kt.'s* Service in *Capite* had made a Devise of all his Socage Land, and then had sold his *Capite* Land, and died, the Devise had been good for the Whole. A Devise of a Rent, or Common, out of all the *Kt.'s* Service Land was good for two Parts only, but Socage Land may be all charged.

V. d. supra.
126.

If such Ten't so restrain'd had made a Feoffment to the Use of such whom he should appoint by Will, the Use vested in the Feoffor, and he had a qualify'd Fee: and if his Will limited the Estates according to this Power, 'twas good for the Whole; *for the Uses of a Feoffment may be as well declared by a Will as any other Writing, tho' of it self it be of no Force to pass Land, and the Persons appointed in Pursuance of such Power, are in by the original Feoffment, as much as if they had been named in it.* But if such Feoffor had devised the Land as Owner, without any Reference to such Power, two Parts only of the Land would have passed. If a Man had conveyed two Parts to the Use of his Wife, &c. and afterwards had made

112.

made such Feoffment of the 3d, and then had devised the Land without any Reference to such Power reserv'd in such Feoffment, yet the whole should pass, for the Will must enure to declare the Uses of the Feoffment, or else it would be void. But a Feoffment made to the Use of one's Will had given him no such Power, *for it had been no more than if he had said to the Use of those to whom I shall devise the Land, for here the Will is not mentioned as a Writing declaring the Uses of another Conveyance, but seems to be taken in its natural Sense, as a Writing in it self Effectual to pass Lands.*

Altho' a Man cannot convey Land to his Wife, in Possession, Rev'n, or Rem'r, for that they are one Person in Law; yet, by such Custom, he may devise to his Wife, because it takes not Effect till after his Death. And the Husband may covenant with others to stand seised to his Wife's Use, or he may make a Feoffment to her Use, which shall be executed by Operation of the Statute; but if he make a Covenant with his Wife to stand seised to her Use, it is void.

The Wife is disabled to contract without the Husband's Consent; but if *cestuyque* Use had devised that his Wife should sell his Land, she might sell it to a 2d Husband, for she did it *in auter droit*, and the Vendee was in by the Devisor.

A Wife cannot devise Land to her Husband, for it shall be intended to be done by Coertion.

Cum

Cum duo inter se pignantia reperiuntur in Testamento ultimum ratum est.

By some Custom, any Land may be devised; by others, that which one has by Purchase only; by some, any Estate; by others, for *L.* only.

By such Custom, one may devise that his Executors shall sell his Land, and in such Case the Land descends to the Heir, *because not the Land, but an Authority only is devised*, and the Executors may alien to whom they please, even without Deed, (*before 29 Ca. 2. 3.*) whether the Thing devised to be sold lie in Grant, or not, for the Alienee is in by the Devisor; & *consuetudo ex rationabili causa usitata privat communem Legem*; but Custom can't take off the Force of a Statute.

Where such Power is devised to Executors, all must join in the Sale, and if one die, it being a bare Authority, cannot survive to the rest, but if Land be devised to *A.* for *L.* and then such Power be given to 3 or 4 Executors, &c. and one of them die, and then *A.* die, the Survivors may sell, for during the Life of *A.* they could not sell, and the plural Number of them still remains. Yet if a Will give such a Power to certain Persons, naming them by their Names, as to *J. S. J. N. J. D.* and one of them die, the Survivors can't sell, for the Words of the Will in that Case can't be satisfied. But if a Will give Land to Executors to be sold, and one of them die, the Survivors may sell, for the Trust, being coupled with an Interest, shall survive together with it. In both Cases, they may
I sell

sell Part at one Time, and Part at another

At Law, if one had refus'd to sell, the others could not sell, but now by 21 H. 8. 4. notwithstanding Part of those to whom such Power is devis'd refuse, the rest may sell. And so may such of those to whom Land is devis'd to be sold who are willing, tho' the others refuse, by a favourable Construction of that Statute. But they can't in either Case sell it to the Executor that refused, for he is privy to the Will, and Executor still, *and Executors do so represent the Person of the Testator, that he does as it were survive in all, and every one of them, and one of them, as Executor, can no more contract with another, than the Testator could with part of himself.*

It is safest in giving such Power by Devise, to limit it to the Survivors or Survivor, or those that prove the Will, &c. and when an Estate is devised to Executors to be sold, it is advisable to appoint, that the Profits taken by them before the Sale shall be Affets, for otherwise they shall not. (a) 2.

(a) Dyer
310. pl. 78.
Off. of
Executors
105.
Litt. Sect.
383.

No Custom is allowable but such as has been used by Title of Prescription, viz. Time out of Mind. When the Time of Limitation of a Writ of Right, which is a Writ of the highest Nature, was from the Reign of R. 1. it was said, That the Continuance of an Usage since that Time, was a good Title of Prescription; *see (b) quere, Whether by the same Reason the Continuance of an Usage for 60 Years, can make a Title of Prescription, since by 32 H. 8. 2. the Limitation of a Writ of Right*

(b) 2 Rol.
A. 269.

is reduced to that Time, for the Practice is otherwise. And there is also another Title of Prescription, which was at Law before any Statute, and this is where a Custom or Usage has been used *de Tempore, cujus contrarium, Memoria hominum non existit*, which is the Way of pleading a Title of Prescription, and is as much as to say, that no Man alive has any Knowledge to the Contrary, or has heard any Proof to the Contrary.

Prescription for the most Part is Personal, being made in the Name of a certain Person and his Ancestors, or those whose Estate he has, or of a Body Politick, and their Predecessors. As when J. S. seised of a Manor in Fee prescribes that J. S. and his Ancestors, and all those whose Estate he has in the said Manor, have Time out of Mind had, and used to have, Common of Pasture in such a Place, being the Land of another, this is properly Prescription. But Custom is Local, as when a Copyholder of the Manor of D. pleads that within the said Manor there is, and has been such a Custom Time out of Mind used, that all the Copyholders of the said Manor have had, and used to have, Common of Pasture in such a Waste of the Lord, Parcel of the Manor. *For a Copyholder cannot lay a Prescription in himself and his Ancestors, by Reason of the Baseness of his Estate.* Both Custom and Prescription require Usage Time out of Mind, and long, continual, and peaceable Possession. If one prescribe to have a Rent, and a Distress for it, it can't

114. be avoided by Pleading that the Rent was always paid by Coertion of Distress

Prescription, being only the Usage of the Country, cannot give a Man a Title to Things that can't be seised as forfeited, till the Cause of Forfeiture appear of Record, as Deodands, or the Goods and Chattels of Traitors, Felons, Felons of themselves, Fugitives, or those that be put in Exigent. Nor can it give a Title to *Things highly touching the King's Perogative*, as Conusance of Pleas, to have a Sanctuary, to make a Corporation, Coroner, Conservators of the Peace, &c.

But Treasure Trove, Waifes, Estraies, Wreck, to hold Pleas, Court-Leets, Hundreds, infange Thief, outfange Thief, a Park, Warren, Royal Fishes, Fairs, Markets, Frankfoldage, keeping of a Gaol, Toll, &c. may be claimed by Prescription without any Matter of Record. And a County Palatine may be claimed by Prescription, and by Reason thereof *bona Felonum*, &c. And a Corporation may be by Prescription.

A Title gain'd by Prescription, can't be lost by Interruption of Possession 10 or 20 Years, unless there be an Interruption of the Right, as by Unity of Possession of Rent, or Common, and the Land charged therewith, of an Estate equally High and Perdurable in both.

In a Writ of Mesne the Plaintiff prescrib'd that the Defendant and his Ancestors had acquitted the Plaintiff and his Ancestors and the

the Ter-tenant, Time out of Mind, the Jury find that the Feoffor of the Plaintiff's Grandfather, and his Ancestors had been acquitted Time out of Mind, but that since no Acquittal had been, and Judgment was given for the Plaintiff, for the Substance of the Issue was found, tho' not the Letter; and a Title once gained is not lost by wrongful Cesser. So where the Plaintiff in Prohibition alledged a *Modus* by Prescription, and the Jury found such Prescription 20 Years before, and since a Payment in Specie, the Plaintiff had Judgment, for the Substance of the Issue is found. And a Commoner that takes a Lease for Years of the Land, may claim his Common after the End of the Lease, for the Inheritance of the Common was suspended, not extinct, and the Title of Inheritance gained by Prescription can't be waiv'd in *Pais*.

Limitation of Writs is the Time prescribed by Statute, within which the Demandant must prove himself, or some of his Ancestors, to be seised, see 32 *H. 8. 2.* but the said Statute shall not be extended to make Seisin within the Time prescribed necessary in such Cases, in which by common Possibility it cannot be had within it, as in a Formedon in Descender, *quare Impedit*, &c. or to make it necessary in such Cases wherein Seisin is not Material, as in case of Rent created by Deed, or reserved on a particular Estate. *By the 21 Ja. 1. 16. He that has Right or Title of Entry, must enter within 20 Years.* See the Statute.

There may be sufficient Proof by Record or Writing, tho' it exceed the proper Memory

mory of any Man living; therefore no Prescription can be against a Statute, because it is the highest Record, unless it be saved by the same Statute; but an Affirmative Statute, as that of Wills, takes not away a Custom; nor does a Negative one, that is declarative of the Law, as that Leets shall be holden but twice in the Year.

Every Burgh is a Town, *non è converso*: Tho it be decayed, it sends Burgeffes. A Town is such a Place as has, or has had a Church, Celebration of divine Service, Sacraments and Burials.

Of Villenage.

116. Villenage is, most properly, when a Villein holds of his Lord, to whom he is Villein, certain Lands, to do to him Villein Service, as to carry out the Dung, &c. and to do whatever is commanded by the Lord, *ubi scire non poterit vespere, quale servitium fieri debet Mane*. And Freemen, by the Custom of some Manors, hold by Villein Service, and their Tenure is Servile: Yet they are free, because their Services are certain, tho' the Tenure be called Tenure in Villenage.

117. If a Villein purchase Land, Rent, or Common, or any Thing certain, the Lord shall have it; but he shall not have a Common uncertain, for it may be a greater Charge to the Ter-ten't; nor shall he vouch in respect of a Warranty made to his Villein; or sue a Bond, or Covenant made to him, &c. because Things in Action lie in Privy, and can't be transferred

Lessee *L. R. or W.* of a Villein shall ente
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and hold to him and his Heirs a Villein's Purchase in Fee; but a Bishop, that has a Villein in the Right of his Bishoprick, shall hold the Villein's Perquisite in Fee in the same Right; and a Husband, that has a Villein in Right of his Wife, shall have the Perquisite in her Right. And if Executors that have a Villein for Years, enter into Land purchas'd by him in Fee, the Fee shall be Affets in their Hands. Co. Lit. 124. b.

If Land be given in *T.* to a Villein, the Lord entring, shall have a Fee determinable on the Villein's Dying without Heir of his Body, and the Fee absolute is in the Donor; and tho' the Lord after infranchise him, yet his Issue shall not recover, for the Statute of *Donis* extends only to those that have Ability to hold such Estate. So if Land be given to an Alien in *T.* and *K.* enter, and then make him a Denizen.

If a Freeman take Land to hold by Villein Service, as to pay a Fine for the Marriage of his Daughter, &c. he shall pay such Fine, and yet he remains free.

Every Villein is such, either by Title of Prescription, *viz.* that he and his Ancestors have been Villeins Time out of Mind; or by his own Confession in a Court of Record.

Every Court of Record is the King's Court, tho' the Profits may be another's; if the Judges of such Court err, a Writ of Error lies; the Truth of its Records shall be tried by the Records themselves. But the Proceedings of Courts Baron may be denied, and tried by Jury, and a Writ of false Judgment, not of Error, lies on their

Judgments. And they can't hold Plea of Debt, or Trespass, if the Debt, or Damages amount to 40 s. or of Trespass *quare Vi & Armis*.

The Issues born after such Confession are Villeins, those born before are free.

118.

If a Villein purchase Lands or Goods, the Lord shall have 'em, but if he alien them, or they descend, or escheat, or be recover'd *in cessavit*, before the Lord enters, he cannot enter, nor claim them, for he had only a Possibility before Entry, and neither *jus in re*, nor *ad rem*. If the Villein be disseis'd, the Lord may enter; (*For his Right of Entry can't be taken away by the wrongful Act of the Dis'sor*;) but he cannot enter after a Descent cast, until the Villein has recovered the Possession. If a Villein being Ten't *T.* discontinue, the Lord can't enter till the Issue has recover'd *in Formedon*. If a Villein buy Goods real or personal, and sell 'em, or make Executors, and die, before the Lord seises 'em, or if a Neif buy Goods, and take a Husband before the Lord seises the Goods, he can't seise 'em. But if the Lord seise Part in the Name of all, or claim the Goods within View, which amounts to a Seisure, like the claim of a Ward in View, this vests in the Lord all the Goods that the Villein has or may have. Note, *Bona* Goods, signifies all Chattels real or personal.

119.

But the *K.* may enter into Land purchas'd by his Villein, or seise his Goods, notwithstanding such Alienation; but he shall not have the Mesne Profits of the Land, before

before the Office found, for his Title is by the Seifure: But the Property of the Goods is in the K. before any Office or Seizure.

If a Villein purchase a Rev'n, the Lord may come on the Land, and claim it, and by that Claim it is in him, for it can be claim'd only on the Land, and his Entry for this Purpose is no Trespass; so if a Villein purchase a Rent, Common, &c.

If the Villein purchase an Advowson, the Lord may come to the Church, and claim the Advowson, and by such Claim the Advowson is in him; so if the Church become void, the Lord may present in his own Name, and gain the Inheritance, for tho' the present Avoidance be so far in the Nature of a Chose in Action, that it can't be transferred by the Act of the Party, yet it is not merely a Chose in Action, for the Husband may present to a Church become void in his Wife's Life.

A Presentation is a Patron's Act offering his Clerk to the Bishop to be instituted to such a Church in these or the like Words, *Presento vobis A. B. Clericum meum ad Ecclesiam de D.* This may be done by Word as well as by Writing, and if it be by Writing, it is no Deed, but in Nature of a Letter to the Bishop, and therefore the K. may present by Word, as well as a common Person.

If the Person present for Money given by the Clerk, or any other for him, such Institution gains not the Advowson, but is merely void by 31 *El.* 6. tho' the Clerk

knew not of it. And whereas at Law such Institution, &c. were only voidable, they are now absolutely void; and if a rightful Patron present Simoniacally, *K.* shall have the Turn; but if an Usurper present Simoniacally, the rightful Patron shall present. And the Statute says, that from henceforth such Clerk shall be adjudged a disabled Person in Law, to have and enjoy the said Benefice, and this being an absolute and direct Law, and made for Suppression of Simony, the *K.* can't dispense with it by any Grant, with *Non obstante*. *And now by 1 W. M. Sess. 2. c. 2. it is declared and enacted, That all Dispensations with Non obstante of any Statute are void, and that the Power of suspending Laws is illegal.*

A Villein is either Regardant, or in Gros; A Villein Regardant is, when one has a Manor, to which a Villein is Regardant, and he, or those whose Estate he has, have been seised of him and his Ancestors as Villeins and Niefs Regardant to the same Manor, Time out of Mind. Such Villein granted to another is in Gros. So if *A.* and his Ancestors have been seised of *B.* and his Ancestors as Villeins in Gros, *B.* is a Villein in Gros.

¶ 21.

He that would have a Thing that lies in Grant by Prescription, must prescribe in himself and his Ancestors, not in himself and those whose Estate he has, for he cannot have their Estate without Deed, which must be shewn. But of Things regardant
or

or appendant, one may prescribe, that he and those whose Estate he has in the Manor or Land, to which such Things are regardant, &c. have been seised of such Things, as regardant or appendant to such Manor, &c. Time out of Mind, because the Manor, &c. might pass without Deed; and tho' a Man can't claim a Thing that lies in Grant by a *que Estate*, yet where it is but a Conveyance to the Thing claimed by Prescription, a *que Estate* may be alledged of a Thing lying in Grant, as one may prescribe that he and his Ancestors, and all whose Estate he has in an Hundred, have Time out of Mind had a Leet, for the Title to the Hundred is not in Question, but whether the Leet be incident to the Hundred. And the Plaintiff in Bar of an Avowry may alledge a *que Estate* in the Lord, as (a) that J. S. whose Estate the Lord has in the Seigniorie releas'd to him, &c. for if he, under whom the Lord claims, had no Title to the Services demanded, the Lord can have none, nor shall the Plaintiff be bound to shew the Conveyance he is not privy to.

Regularly, the Plaintiff or Demandant shall not entitle themselves by a *que Estate*, but the Ten't or Defendant may, and so may the Plaintiff in Replevin after Avowry made, for thereby he becomes as Defendant. One may plead a *que Estate* of a Tenancy in T. or of an Estate L. if he aver the Life of Ten't in T. or Ten't L. For at Law such an Estate might have been gain'd by Occupancy. But one cannot plead a *que*

(a) Bro. que Estate 3.

Bro. que Estate 1.

(a) 1 Lev.
109. 3 Lev
19.

que Estate of a Lease *T.* in himself: Because a Title to a Lease *T.* cannot be had but by Grant of the Party, or Act of Law. Yet one may plead a *que Estate* of a Lease *T.* in a (b) Stranger, because he is not privy to his Title. A Dis'sor, &c. or any other in the Post, may plead a *que Estate*. But every Tenant that pleads it must alledge it in himself, and not in those in the mean Conveyance from whom he claims.

Nothing but a Villein is said to be Regardant to a Manor, &c. but an Advowson, and other Things may be Appendant. Inheritances Appendant, or Appurtenant, are such as belong to others more worthy. Appendants are always by Prescription, but Appurtenants may in some Cases be created at this Day, as if one grant to another and his Heirs Common of Turbary to be spent in his Manor, or Common in such a Moor, for his Beasts levant and couchant on his Manor, by such Grant the Commons are appurtenant to the Manor. Both Appendants and Appurtenants are called in Latin *Pertinentia*, and pass by the Grant of the Manor to which, &c.

If *A.* have a Manor to which the Royal Franchises of Waife and Stray are appendant, and convey the same to the *K.* the said Franchises are thereby re-united to the Crown. But if *K.* grant the Manor in as large and ample a Manner as *A.* had it &c. it is said that the said Franchises shall be appendant again, or rather appurtenant to the Manor.

Pre-

Prescription can't make Land appendant to Land, or Things incorporeal to Things incorporeal, but it may make Land appendant to an Office, or Advowsons, Villeins, Common, &c. to Land. But it can't make Estovers of Fewel to be burnt, or a Seat in a Church, appendant to Land, but only to a House. Nor can it make a Leet, that is Temporal, appendant to a Church that is Ecclesiastical; for the Appendant and Thing to which, &c. must agree in their Nature.

The Thing to which another is appendant must be of perpetual Subsistence, therefore an Advowson appendant to a Manor, is in Truth appendant to the Demesnes, not to the Services. An Advowson is appendant to the Manor of *D.* of which the Manor of *S.* is holden, the Manor of *S.* becomes Parcel of the Manor of *D.* by Escheat; the Advowson is still appendant to the Manor of *D.* only. Where a Corrody, which may be extinguish'd, was said to have a Chamber Parcel of it, there he that had the Corrody had but his Habitation in it, as a Fellow of a College has in his Chamber. As for Offices in Fee to which Land may belong, they are in perpetual Subsistence, either being in *Esse*, or in that they are grantable over.

122.

If Parceners of a Manor, to which an Advowson is appendant, make a Partition of the Manor without speaking of the Advowson, or make Composition to present against Common Right, yet it remains appendant; but if it be expressly excepted upon

on the Partition, it becomes in Gross. There be four Kinds of Common of Pasture.

1. Common Appendant, which of common Right belongs to arable Land for Beasts that serve for Maintenance of the Plough, as Horses and Oxen to plough the Land, Kine and Sheep to compester it; and for such Common, there is no Need to prescribe.

2. Appurtenant, for Beast not commonable, as Swine, Goats, &c. and this can't be had without Prescription. Common Appendant, because it is of common Right, shall be apportioned by the Commoner's Purchase of Part of the Land in which he hath such Common; but common Appurtenant shall be extinct by the Commoner's Purchase of Part of the Land in which, &c. both Common Appendant and Appurtenant shall be apportioned by Alienation of Part of the Land to which the Common is Appendant or Appurtenant.

3. Common *pur Cause de Vicinage*, which is but an Excuse of Trespass, and no Man can put his Beasts into the Land in which he has such Common, but they must escape thither themselves, and either of the Parties that has such neighbouring Grounds may enclose against the other.

4. Common *in Gross*, which belongs to no Land, and must be by Writing or Prescription.

Some Commons are for a certain Number of Beasts, some are certain only by Consequence, as Common for so many Beasts

as are Levant and Couchant on such a Manor, &c. Others are uncertain, as Common *Sans nombre* in Gross, and yet in all these Cases the Ten't of the Land must feed there too.

Common Appurtenant to Land is only for Beasts levant and couchant thereon, and if he that has such Common put in other Beasts, he is a Trespasser. (a) But he that claims (a) 2Saund. the sole Pasture of Land, or Pasture for a 327. certain Number of Beasts, may license a Stranger to put in his Beasts.

Common in one Manor appendant to another, is appendant to the Demesnes, and not to the Services; therefore if any of the Tenancies escheat, the Lord shall not encrease his Common by Reason thereof. One can't prescribe to have *Communiam Pasturæ*, or *Piscariæ*, or *Liberam Piscariam*, and exclude the Owner of the Soil, for it is against the Nature of a Common; but one may prescribe to have *solam vesturam Terræ*, from such a Day to such a Day, and exclude the Owner of the Soil; (b) but (b) 1 Vent. 391. it has been questioned whether one can prescribe to have *solam Vesturam*, or *pasturam Terræ* at all Times, so as wholly to exclude the Owner of the Soil from feeding there, 1 Saund. 251. but one may prescribe to have *separalem Piscariam*, and exclude the Owner of the Soil wholly from fishing, for he has still the Profit of the Soil and the Water, &c. 2 Saund. 326.

The Dis'see of a Manor may present to a Church appendant before he re-enters into the Manor, but he can't use Common appendant,

pendant, because it would be a Prejudice to the Ten't of the Land.

One may confess himself to be a Villein in a Court of Record, and thereby he becomes a Villein in Gross. As if in a *Procipe* brought against a Man, he confesses himself to be a Villein to *A.* he is by this his Villein for ever, tho' the Demandant reply that he was free at the Time of the Writ, and the Jury find that he was so. In a *Nativo habendo*, if the Plaintiff offer to prove the Villenage by the Defendant's Kindred, and the Uncles of the Defendant, being examined in Court, confess themselves Villeins to the Demandant, and this be enter'd on Record, they are made Villeins thereby for ever. But if one come into Court extrajudicially, and confess himself a Villein to *J. S.* he is not bound thereby, for the Court has no Authority to take his Confession.

A Man that is a Villein is called a Villein, a Woman is called a Nief; and a Woman outlawed is said to be waiv'd, for she is not sworn to the Law, as Men are at the Age of 12, or more, therefore such are said to be *Utlagati*, Women, *Waiviatæ*, *id est*, *Derelictæ*.

123.

If a Villein marry a Free-woman, their Issue is Bond; if a Free-man marry a Nief, the Issue is free, for Husband and Wife are one Person in Law, but by the Civil Law, *partus sequitur Ventrem*. A Bastard cannot be a Villein, unless he will confess himself such, *quia nullius Filius est*, for as he can receive no Benefit of his Parents by his Birth,

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Birth, so shall he have no Prejudice thereby. And tho' by Force of the said Maxim he happen to be in a better Case than the law-ful Issue, yet the Law will not make an Exception from it to the Prejudice of Freedom. A Bastard is not such a Son in Consideration whereof an Use may be rais'd. A Child born more than nine Months after a Man's Death can't be reputed his Son.

A Villein may bring all Sorts of Actions against any but his Lord, but he can bring no Action against his Lord, whether he have an Estate of Inheritance in him, or only an Estate L. or T. &c. But if the Lord make a Lease of his Villein, he may bring an Action against the Lessor during the Lease: And a Villein may bring an Appeal of the Death of his Ancestor against his Lord, and if it be found for him, he is enfranchised, and by the general Purview of the Statutes, which give an Appeal of Rape, a Nief may have an Appeal of Rape against her Lord: But a Villein cannot have an Appeal of Robbery against his Lord.

A Villein as Executor, shall have an Action of Debt against his Lord, and if the Lord take from him Goods which he has as Executor, he shall have an Action of Trespass against the Lord, and recover Damages to the Testator's Use. And he is not enfranchised by such Action, if the Lord make Protestation that he is his Villein: But if he do not, the Villein becomes free, tho' the Matter be found for the Lord, and against the Villein: But a Protestation saves him

(a) Finch of
Law, 359.

Co. L. 126.

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125.

him that takes it from being concluded by his Plea, if the Issue be found for him, (a) and so it shall, as it seems, tho' it be found against him, if he could not plead the Matter which he takes by Protestation, as where one enters into Warranty and takes by Protestation the Value of the Land, this shall serve him as to the Value, albeit the Plea be found against him.

Every Tryal shall be from the Neighbourhood of a Town, Parish, Hamlet, Manor, Castle or Place known out of a Town, &c. as some Forests and such-like, within the Record, within which the Issue is alledged, which is most certain and nearest thereto; as if a Fact be alledged, in *K.'s Street, in parochia Mar. in civitate Westmon.* the Visne shall come from *K. Street*, for being generally alledg'd, it shall be esteem'd a Town; but if the Words had been *in quâdam plateâ vocatâ K. Street*, &c. it should have come from the Parish, for no Visne can come from a Street. Tho' a Parish may contain divers Towns, yet being generally alledged, it shall be intended to contain no more than one, unless the Party shew the Contrary. If a Trespass be alledged in *D. & null tiel Ville* be pleaded, the Jury shall come *de corpore Comitatus* for to award the Venire to *D.* would be to pre-judge the Question. If it be alledged in *D.* and *S. & null tiel Ville de D.* be pleaded, it shall come from *S.* If a Manor be alledg'd in a Town, the Visne shall be from the Town.

In a real Action, if one demand Land as Heir to his Father in one County, and alledge his Birth in another, and it be denied that he is Heir, it shall be tried where the Land lies; for *his being born of such a Woman is not so material in this Case, as her being married to the Person from whom he claims, which may be presum'd to be best known where the Land lies*; but if he demand Lands as Son and Heir to a Woman, &c. it shall be tried in the County where the Birth was alledg'd, for *if he can prove his Birth of such a Woman, he must be her lawful Issue, whomsoever she were married to, and the Presumption of Law shall be in Favour of Legitimation*. So where Bastardy is generally alledged, *mutatis mutandis*. If one plead Letters Patents, and the other plead *non concessit*, it shall not be try'd where they bear Date, but where the Land lies, for *the Issue is not whether such Patents were made (for they are Records, and cannot be denied,) but whether the Land pass'd by 'em*.

When the Issue extends to a Place at Law, and to a Place in a Franchise, it shall be tried at the Common Law.

Tho' the *Venire* be awarded to the Coroners where it ought not, or the Visne come from a wrong Place, yet if it be done by Consent, enter'd of Record, it is good.

But by 4 & 5 Annæ 16. *Venires out of the Courts at Westminster, shall be de corpore Comitatus, except in Prosecutions Criminal, and on Penal Statutes*.

In an Action against two, one pleads to the Writ, and the other to the Action, the Plea to the Writ shall be tried first, for if it be found, it abates the whole Writ. In Trespas, one pleads Not guilty, and the other a Release, the Plea of Release shall be try'd first, for if it be found true, the other Defendant shall take Advantage of it. But in real Actions one shall have no Benefit of the other's Plea; therefore, tho' the Plea of one go to the Whole, yet both shall be tried, for each Party may lose his Part by this Mis-plea. If there be an Issue for Part, and Demurrer for Part, the Court may direct the Trial of the Issue, or judge the Demurrer first, at their Pleasure.

126.

An Issue is a single, certain, and material Point, issuing out of the Allegations of both Parties.

Being taken generally, it refers to the Count, not to the Writ; as in Account, the Writ charges the Defendant generally, to be Receiver to the Plaintiff, the Count charges him especially, as Receiver by the Hands of T. he pleads that he was not Receiver *modo & formâ*, this refers to the Count, so that he shall only be charged with the Receipt, by the Hands of T.

An Issue shall not be joined on a Negative Pregnant, as *ne dona per le fait*, which implies a Gift by some other Conveyance; so that the Court must be in doubt, whether the Party ought to have Judgment, tho' the Issue be found for him.

An

An Issue join'd on an *absque hoc*, &c. ought to have an Affirmative after it, *i. e.* *he that traverses the other's Plea, ought not to conclude, hoc petit quod inquiratur per Patriam, if he be Plaintiff, or de hoc ponit se super Patriam, if he be Defendant; because, perhaps the other Party may demur, but such Conclusion ought to be made by him that pleaded the Matter travers'd, upon his re-affirming of it.*

Dy. 353.
pl. 29.

An Issue regularly ought to consist of an Affirmative and a Negative; and two Affirmatives shall not make an Issue, except in special Cases, as (a) where the Defendant pleads that the Plaintiff was born in France; and he replies that he was born in such a Place in England; this is a good Issue, for if he should traverse the Birth in France, it could not be try'd. Sometimes an Issue is good, tho' the Affirmative and Negative be not in precise Words, as if in an Action of Debt for Rent by Lessor T. the Defendant plead that the Plaintiff had nothing in the Land at the Time of the Lease, and he reply, that he was seised in Fee. For the direct Traverse of the Plea, viz. That he had something in the Land would not decide the Question, for he might have an Interest as Lessee W. and yet not be able to make a Lease T.

(a) Co.
Litt. 261.

Cro. Jac.
312.

Some negative Pleas are Issues of themselves, and he that pleads them, may conclude, & *hoc petit quod inquiratur*, &c. as where the Demandant counterpleads a Voucher, that neither the Vouchee nor his Ancestors had any thing in the Land, he shall

shall conclude *Et hoc petit, &c.* or where one pleads in Avoidance of a Fine, *quod partes finis nihil habuerunt*, he may make the like Conclusion, for either of these Pleas being found for him that pleads them, will make an End of the Matter; and the Affirmatives directly contrary to these Pleas, viz. that he and his Ancestors had something in the Land in the first Case, or *quod partes finis aliquid habuerunt* in the Second, are not only uncertain, but immaterial, for if either he or any of his Ancestors were seised in the first Case, or if either of the Parties to the Fine were seised in the second, it is sufficient: So if the Ten't in a Writ of Dower pleads *nunques seisieque Dower*, he shall conclude, *Et de hoc ponit se super Patriam, &c.*

Issue shall not be taken whether a Woman be with Child by her late Husband, for *Filiatio non potest probari*.

The Lord can't maim his Villein (*i. e.*) disable any Member of his Body, so as to make it unfit for Fighting, which can be expressed by no other Word but *Mayhemavit*,) because the Life and Members of every Subject are under K.'s Protection, that they may serve him and their Country: And it is fineable for a Man to maim himself. If the Lord maim his Villein, the Villein can't have an Appeal of Maim against him, for in such Action he can only recover Damages, which the Lord may take from him again, but the Lord shall be indicted for it, and grievously fin'd and ransom'd.

Fine and Ransom do both signify the same pecuniary Punishment, call'd a Fine, because it makes an End for the Offence with K. a Ransom, because it redeems from Imprisonment, for regularly he that is fined, is imprison'd till it be paid. Anciently he that was guilty of Maim, lost the same Member, therefore the Writ was *Felonice Mayhemavit*, and tho' at this Day Damages only are recovered, yet the Word *Felonice* is retain'd. By 22 Ca. 2. 1. *Slitting the Nose, or cutting off Nose, or Lip, or cutting off, or disabling any Limb, or Member, with Intent to maim, or disfigure, is Felony without Clergy.*

An Amercement, in Latin call'd *Misericordia*, differs from a Fine, in that a *Capiatur* shall not be awarded for it, as it shall for a Fine, and it ought to be assess'd moderately, and affect'd by ones Equals, or else a Writ *de moderata Misericordia* lies. The Reason why the Ten't or Defendant is amerc'd, is for his Delay in not rendring the Thing demanded at the Day, according to the Command of the Writ; and therefore if K. before Judgment pardon the Delay, which is the original Cause of the Amercement, he discharges it, tho' he be not fully intitl'd to it before Judgment. If an Infant hanging the Plea come to full Age, he shall not be amerc'd, but for his Delay after his full Age.

And if the Plaintiff be *non suit*, or Judgment be given against him, he shall be amerc'd *pro falso Clamore*; so shall he be amerc'd, where the Writ abates by his own Act

Act, but not when it abates by the Act of God. Those that find no Pledges, shall not be amerc'd as *K. Q. &c.*

There are six Sorts of Persons disabled to bring any Action, and if they do bring one, Judgment may be demanded if they shall be answered.

1. A Villein is disabled to bring an Action against his Lord.

He that pleads in Disability, shall but defend the Wrong and the Force, and shew how the Plaintiff is disabled, and demand Judgment if he shall be answered. But one can neither plead in Disability, or to the Jurisdiction, unless he make himself Party by this part of the Defence. *Sed Q.*

(a) 3 Lev.
182.

(b) 1 Lut. 9.

(c) 1 Lut. 7:

For (a) the Defendant in Ejectment may plead that the Land is ancient Demeasne, either with or without making any Defence; and so (b) it seems that a Man may plead other Pleas in Abatement without making any Defence; but the surest Way is to plead venit & defendit vim & injuriam, without adding any more; but after full Defence, (which is thus, defendit vim & injuriam quando, &c. & damna, & quicquid quod ipse defendere debet, or (c) thus, defendit vim & injuriam quando, &c.) one cannot plead in Disability, nor to the Jurisdiction. It is so necessary for the Defendant to make lawful Defence, that tho' he plead a good Bar without it, Judgment shall go against him. If the Lord plead, that the Plaintiff is his Villein, and it be found that he is free, and the Lord bring Error, this does not infranchise the Villein, nor needs the Lord make

make Protestation, while the Record is in Force.

- None at Law could sue, or defend by Attorney, without Writ or Warrant so to do; but by one call'd *Responsalis* he might in Case of Extremity, shew the Cause of his Absence, and certify on what Tryal he would put himself. And one may have an Effoin, or a Protection cast for him by a Stranger.

128.

2. He that is outlaw'd, (as any one may be that is past the Age of 12, or has abjur'd the Realm, is disabled to sue an Action in his own Right during the Outlawry, &c. but he may sue *in autre Droit* as Executor, &c. and he may bring a Writ of Error to reverse an Outlawry, he may likewise bring an attain by 23 H. 8. 3.

One that is outlaw'd in the County Palatine of Lancaster is disabled to sue at Westminster, but one outlawed in Chester or Durham is not, for the former is a County Palatine by Parliament, the latter by Prescription only.

1 Vent. 155.

When Outlawry is pleaded in Disability, the Record must be shew'd forth presently, *sub pede Sigilli*, unless it be in the same Court, but when it is pleaded in Bar, a Day shall be given to bring it in, if it be denied.

Judgment given by the Coroners in the County, does not disable a Man, till the Exigent be return'd, and the Outlawry appear of Record.

Not only an Appearance in Deed, but a Purchase of a Superfedeas out of the Court

K

where

where the Record is, which is an Appearance of Record, avoids an Outlawry, whether it be delivered to the Sheriff before the *quinto exactus*, or after.

(a) 44 E. 3.
27.

(a) If Outlawry be pleaded in Disability, and the Plaintiff demand a Day to answer it, and before the Day purchase a Pardon, he is restored by the Pardon.

Where the Ground of the Action is forfeited by Outlawry, it may be pleaded in Bar; as in Debt, Detinue, &c. but where the Ground of the Action is uncertain, and not forfeited by Outlawry, it can be pleaded in Disability only.

Process of Outlawry lies in all Actions *quare Vi & Armis*, by Common Law, and by Statute, in Debt, Detinue, Account, Covenant, Annuity, Case, &c.

Formerly any one might execute an Outlaw, now the Sheriff only, tho' he be outlawed for Felony.

129.

Vid. sup. 2.

3. An Alien is disabled to bring any Action, and if he do, the Ten't or Defendant may plead that he was born in such a Country, out of K.'s Ligeance, and demand Judgment, &c. But it is not enough to say, that he was born out of the Realm, for one may be born out of the Realm, as in *Ireland*, *Jersey*, &c. and yet within K.'s Ligeance. *And the Child of a Merchant, living beyond Sea, is a natural Subject, tho' he be born beyond Sea.*

Cro. Car.
601.

Denizen, either signifies a natural born Subject, or one privileg'd by K.'s Letters Patents; these may be either general, granting *quod ille in omnibus habeatur, reputetur, tractetur*

tractetur, & gubernetur, tanquam ligeus noster, &c. or they may be particular, enabling one to sue only.

Ligeance is the faithful Obedience of a Liege Man, or Subject, to his Liege Lord or Sovereign. And *Ligeus* is ever taken for a natural born Subject.

Ligeance is either perpetual or temporary ; the first is either by Birth, *quam nemo ejurare potest, nec Patriam exuere*, or by Grant of Naturalization, or Denization. The second is either local, which lasts as long as an Alien lives under K.'s Protection, and makes him indictable of High Treason, *quod contra ligeantiae suae debitum, &c.* or limited, as when one is made a Denizen on Condition, or for Life, or in Tail Male, or *special Tail, &c.* Vid. sup. 11.

An Alien being a Prior may sue in Right of his House, *and he may (a) sue as Administrator, &c.* And an Alien, whose K. is in League with ours, may bring personal Actions in his own Right, tho he can bring no real Action ; but an Alien Enemy can bring neither a real nor personal Action, and if he do, the Ten't or Defendant may either plead in Disability, or conclude to the Action. (a) Cro. Ca. 9.

4. Persons attainted by Judgment against them on a Writ of *Præmunire*, are disabled to bring any Action, for by such Judgment they are out of K.'s Protection, forfeit all their Lands in Fee-Simple, and Goods, and are subject to Imprisonment for Life, and, in former Days, they might have been killed by any One, as being Enemies to K. A so every one attainted of Treason, or Felony

lony, is disabled to sue any Action, for he is dead in Law.

There is a general Protection of *K.* which extends to all his Subjects, Denizens, and Aliens within the Realm, and is lost by Judgment in *Premunire*; and there is a particular Protection by Writ, of which there are two Kinds.

The first is for the Safety of one's Person, and Possessions, from unlawful Violence, which is called a Protection *cum clausula nolumus*, from the Word *Nolumus* in the Writ, by which such Protection is granted; and this is no more than the Law implies in *K.*'s general Protection, and all Writs for such Protection, are of Grace, saving one, which a spiritual Person may, of Right, sue forth for himself, and his Farmers, that their Goods be not taken against their Will, by *K.*'s Ministers, &c.

The Second is for the staying of Suits, and is call'd a Protection *cum clausula volumus*, from these Words in the Writs by which it is granted, *volumus quod interim sit quietus de omnibus placitis & querelis*.

Of these Protections for the Staying of Suits, there are four Sorts. 1. *Quia Profecturus*. 2. *Quia Moraturus*, (*viz.* for one that is to go, or stay, beyond Sea, on *K.*'s Business.) 3. *Quia indebitatus nobis existit*. 4. *Quia imprisonatus ultra mare*, for one sent into *K.*'s Service, beyond Sea, who is imprisoned there.

As to the Protections *Profectura*, & *Moratura*, these nine Things are to be observed.

1. The

1. The Cause for which they are granted, must be set forth in the Writ, that it may appear to the Court that they are granted for the publick Good, and the Service of the Kingdom, either in War, or in Negotiations of Peace, &c.

2. They may be granted to Men within Age, and to Women in three Cases, *quia lotrix, seu obstetrix, seu nutrix*; but not to a Corporation Aggregate, because it is invisible. A Protection granted to the Husband, shall serve for the Wife.

Vid *supra*,
109.

Regularly a Protection can be cast only for the Ten't or Defendant, but not for the Plaintiff or Demandant, or one that is an Actor in nature of a Plaintiff, as an Avowant, or the Garnishee after Appearance, &c. But it may be cast for a Vouchee, Ten't by Receipt, or Aid Prayer, when the Demandant has granted the Voucher, &c. whereby they are made privy. It may also be cast for the Garnishee, at the Day of the Return of the *Scire Facias* against him. But it cannot be cast for an Officer of K.'s Receipt, or of a Court of Record whose Attendance is necessary.

A Protection cast by one Defendant, puts the Plea without Day for all, except in Trespas, and Actions in the Nature of Trespas, where each may answer without the other; and in Trespas Protection for one serves for all, if they join in Plea, or if they plead several Pleas, and one *Venire* is awarded against all.

3. By 13 R. 2. 16. *Proteſtio proſecturæ* is not to be purchas'd hanging the Plea, ex-

cept for a Voyage Royal, but *Protectio Moraturæ* may.

A Protection can't be allow'd, but when the Party has a Day in Court, therefore it can't be cast against any Writ of Execution, except a *Scire Facias*.

Vi4. infra.
250.

A Protection cast at *Nisi prius* shall save a Default, tho' it be repeal'd before the Day in Bank, because it was once well cast; but if it be afterwards disallow'd for Variance, the Default is not sav'd.

If a Man have a Protection, and notwithstanding plead a Plea, yet at another Day of Continuance it may be cast.

Neither of these Protections shall endure more than a Year and a Day after the *Teste*, if they are tested 7 *Jan.* and allow'd *pro uno Anno*, the Re-summons shall be 8 *Jan.* the next Year, yet that is the last Day of the Year.

4. These Protections must be to some Place out of the Realm, as *Scotland* or *Ireland*, &c. *Protectio quia moratur supra altum mare* is not good.

131.

5. Neither of these Protections are allow'd in Actions that touch the Crown, as Appeals of Felony or Mayhem; nor where the *K.* is sole Party, nor where he and a Subject are Parties, nor in *Quare impedit*, nor Assise of Darrein Presentment, for the Danger of a Lapse; nor in *Quare non admisit*, because it is grounded on the *Quare Impedit*; nor in Assise of Novel Disseisin, nor in Certificate of Assise, because it is grounded on Assise of Novel Disseisin, which anciently was called *Festinum Remedium*. Nor in Dower *unde nihil habet*, because

cause the Demandant has nothing to live upon.

An Infant was vouch'd, a Protection was cast for him at the *Pluries venire facias ad habendum visum*, and disallow'd, for his Age must be judg'd by the Inspection of the Court, and the End of such Process is only to view him for that Purpose, and his bare Appearance is sufficient to give the Court Satisfaction. An Infant brought a Writ of Error on a Fine, and sued a *Scire Facias* against the Conusee, for whom a Protection was cast, and the Court examined, and recorded the Plaintiff's Age, and then allow'd the Protection, and the Nonage being recorded, the Heir of the Infant may reverse the Fine, but if the Plaintiff had died before his Age had been inspected, the Fine could never have been revers'd.

By 23 H. 8. 3. Protections are ousted, in Attaint, and by 1 R. 2. 8. In Actions for Victuals bought for the Service mention'd in the Protection, and in Pleas of Trespass, &c. done since the Date of the Protection. And by the late Statutes, they are generally expressly ousted, in personal Actions given by the same Statutes.

If a Writ of Deceit be brought against one for casting a Protection on an undue Surmise, the same Protection may be cast again, for it gives a general Freedom from all Suits, till the Time be elapsed.

6. They must be under the great Seal, and generally directed.

7. Any Court (whether it be of Record, or not,) wherein they are cast, may allow or disallow of them.

K 4

8. An

8. An Infant, *Feme Covert*, or Monk, may cast a Protection, so may the Party himself, but if he cast it himself, he ought to shew Cause why he ought to take Advantage of it, but a Stranger needs not shew any Cause.

9. They may be avoided three Ways. 1. On the Casting of them before they are allow'd. 2. They may be disallow'd afterwards for Variance betwixt them and the Record; or because they lie not in the Action, or for that the Party has no Day to cast them in. 3. If the Party go not to the Service for which they are granted, they may be repeal'd by *Innotescimus*; but, being Records, they can't be avoided by Averment.

The 3d Protection, *cum Clausula volumus*, is for the King's Debtor; but now by 25 E.

3. 19. a Creditor may have Judgment against the King's Debtor; but he shall not have Execution unless he will take upon him to pay the King, and then he shall have Execution for the King's Debt as well as his own.

The fourth Protection, *cum Clausula volumus is quia Imprisonatus, &c.* Neither this, nor the Protection last mention'd, have any certain Time limited in them.

152.

5. He that is profess'd of Religion in any part of *England*, is disabled to bring any Action; but one profess'd in foreign Parts, is not disabled, because his Profession cannot be tryed by the Ordinary's Certificate, which is the only Tryal allow'd of by Law in this Case.

A Man is said to enter into Religion at his

his first coming, and living under Obedience to the Rules of some Order, but he is not profess'd till he has taken the Vow. Vid. supra, 142.

A Man profess'd, is dead in Law, and his Heirs, Executors, and Administrators, represent him as if he were dead in Deed. His Heir shall be bound by Warranty made by him, and shall have a Writ of *Mortancaster*, (and the Writ shall say, *fi D. Pater, &c. die quo habitum Religionis assumpsit, in quo habitu Professus fuit, &c.*) and if he be within Age, he shall be in Ward, as to Lands holden by *Kt.*'s Service. If one owe Money to the Abbot of *D.* and after become Abbot of *D.* he may sue his own Executors. 7 N B. 196. 20.

But if Ten't *T.* discontinue, and enter into Religion, his Issue shall not have a *Formedon* till his natural Death, for no Man by his own Act shall derogate from his own Grant. And if the Husband be profess'd, his Wife shall not be endow'd till his natural Death; and if she alien Land which she has in her own Right, and he be afterwards deraign'd, he shall avoid the Alienation; for the Wife shall have no Benefit by his entering into Religion, because without her Consent, he would not have done it; but some have said, that either Husband, or Wife, *ante Carnalem Copulam*, may enter into Religion without the other's Consent, but after, they cannot without mutual Consent. If a Dissor enter into Religion, and become profess'd, yet the Dissor may enter, notwithstanding the Land descends to the Heir of the Dissor,

for no one, by his own Act, shall prejudice a Stranger's Right.

The Head of a religious House, tho' he be profess'd, may purchase, sue, and be sued for any Thing touching the House.

If one profess'd be Executor, Bishop, or Parson, he may sue in *autre Droit*. If he be K.'s Farmer, he may have an Action touching the Farm. If a Monk be beaten or imprison'd, he and the Abbot may join in an Action, and the Writ may either conclude *ad damnum ipsius Prioris*, or *ipsorum*. In the same manner if he be falsely and maliciously indicted of Felony, they shall join in a Writ of Conspiracy.

333. A Wife is disabled to sue, or be sued, without her Husband, notwithstanding the Husband be banish'd for a Time, which some call a Relegation; but the Wife of one that has abjur'd the Realm, or of one perpetually banish'd, by Parliament, may sue, or be sued, as a *Feme Sole*, and shall recover her Lands alien'd by her Husband. *Note,*

That one can't be absolutely banish'd, so as *perdere Patriam*, by any but by Parliament K.'s Wife is an exempt Person from him, and may purchase, sue, or be sued, without him.

She can't be amerc'd, and therefore shall find no Pledges.

(a) Q.

= last. 361.

She shall not be (a) barr'd by Pleading pleaded against her in a *Quare Impedit*.

She is not within 1 H. 4. 6. which enacts, That in all Petitions to K. for Grants of Land, &c. Mention must be made of the Value there-
of

of, and of what former grants the Petitioners have had.

Her Bailiff, in an Action concerning the Hundred, shall say, *in contemptum Domini Regis & Regine*.

She pays no Toll, nor is she bound by the Statute of *quia Emptores* to distress *pro Rata*; nor is she within the Statute of *Marl-bridg*, cap. 4. which prohibits the Driving a Distress into another County.

It is Treason to compass her Death, and none can marry the Queen Dowager without K.'s Licence.

But K.'s Wife shall be sued by a *Præcipe*, not Petition, and a Protection shall be allow'd against her, but not against K.

134

6. A Person excommunicate is disabled to sue any Action, and if he do bring any, the Ten'tor Defendant may plead that he is excommunicated, and shew the Bishop's Letter, under his Seal, witnessing the Excommunication, and demand Judgment if he shall be answered. But a Man shall not be disabled by Excommunication pronounced by any foreign Bishop; nor shall one excommunicate by an *English* Bishop, be disabled to bring an Action against the same Bishop.

There is the greater, and the lesser Excommunication; the greater excludes a Man from the Communion of the Faithful, as well as of the Sacraments: The lesser excludes a Man from the Communion of the Sacraments only: But either of them disables the Party.

A Corporation Aggregate can't be disabled

bled by Excommunication of the Members, for the Body Politick, *which is the Plaintiff, rests only in Consideration of Law, and can't be excommunicate*, and can only appear by Attorney. But where the Plaintiff is excommunicate, he is disabled to sue either in his own Right, or another's, as Executor, Parson, &c. for they which converse with one excommunicated, are excommunicated also.

Anciently an Official might certify an Excommunication, but now none can certify it but the Bishop himself, (unless he be beyond Sea,) or one that has ordinary Jurisdiction, and is immediate Officer to the King's Courts, as Arch-deacon of *Richmond*, or Dean and Chapter in Time of Vacation.

A Bishop's Certificate under his Seal remains good after his Death; but a Certificate by a Bishop, that another Bishop has certified him that the Party is excommunicate, is not good.

None but the King's Courts of Record, ^{2s} King's Bench, Common Pleas, Justices of Gaol Delivery, and the like, can write to the Bishop to certify any Ecclesiastical Matter. But no inferior Court, as of *London*, or any other Corporation, can do it, but the Plea must be removed into the Common Pleas, and that Court shall write to the Bishop, and remand the Plea. For this Cause, Conufance shall not be granted in a *quare Impedit*: And a *quare Impedit* of a Church in *Wales* did lie in the County next adjoining, because the Lordships Marchers could not write to the Bishop. *Be*
K.'s Justiciar in Wales had power to write to

the Bishop, therefore a quare Impedit for Churches in the ancient Shires, which were within his Jurisdiction, did always lie in Wales.

If the Excommunication pleaded can't be denied, the Writ shall not abate, but Judgment shall be that the Ten't or Defendant shall go quit without Day, and when the Plaintiff is absolv'd, he shall have a Resummons, or Re-attachment, and bring the Defendant into Court again; (so shall he also where the Plea is put without Day for other Causes, as *Non venue* of the Justices, Protection, *Essoin de Service le Roy, &c.*) But in all the other five Cases where Disability is pleaded, the Writ shall abate, if the Matter pleaded can't be gainsaid.

Vid. *supra*.
191.

Dies in Law is the Day of Appearance of the Parties, or the Continuance of the Plea.

In real Actions there are *dies Communes*, for which see the ancient Statutes.

Marl. 12.
32 H. 8. 21.
16, 17. C.
1. 6.

In all Summons on the Original, the Party must be summon'd 15 Days before the Day of the Return of the Original, and the Statute of *Articuli super Cartas*, ca. 15. which requires that in all Summons, and Attachments, in Plea of Land, there shall be contain'd the Term of 15 Days, was in Affirmance of the Common Law.

Vid. 2 Inst.
567.

If the Original be return'd *Tarde*, (*i. e.* deliver'd to the Sheriff so late that he had no Time to serve it,) in which Case an *Alias Summoncas* goes forth, there must be nine Return-Days inclusively between the Teste and Return thereof, as there must be in all other

other judicial Proceſs in real Actions. But if one demand Conuſance of Pleas to be holden within his Mannor, Proceſs ſhall be awarded there from 3 Weeks to 3 Weeks.

K.'s Bench may proceed, *de die in diem*, When the Offence is committed in the County where they Sit, but when it is remov'd by *Certiorari*, there muſt be 15 Days between every Proceſs, and the Return thereof.

2. There is *Dies Specialis*, as in an Affiſe, in either Bench, there need not be 15 Days after the Attachment, before the Appearance; but before Juſtices aſſign'd, there muſt; and generally in Affiſes the Juſtices may give any ſpecial Day, out of Term as well as in Term. And in Affiſe, if the Parties be adjourn'd to a common Day, as *Quindenam Paſch. &c.* they are not demandable till the fourth Day after, but when they are adjourn'd to a certain Day of the Week, as *Monday, Tuesday, &c.* they are demandable on that very Day.

Upon an Imparlane, or after Demurrer, the Court may give any ſpecial Day, ſo it be in Term. In a *Scire Facias* on a Fine, or Recovery in a real Action, becauſe they are Writs of Execution, and in all judicial Writs, Proceſs againſt an Infant to judge of his Age, Proceſs when the Husband prays in Aid of his Wife, or *Pone* at the Defendant's Suit, there need not be 15 Days.

135.

3. There is *Dies Gratie*, which is regularly granted by the Court, at the Prayer of the Plaintiff, or Demandant, but never at the Prayer of the Ten't, or Defendant; but

this shall never be granted where K. is party by Aid Preyer, or when a Peer is Ten't or Defendant. Sometimes the Day that is *quarto Die post*, is call'd *Dies Gratiæ*, for no Default is recorded till that is past, except in a Writ of Right; but in all Cases the very Day of Return is the Day in Law, and to that, the Judgment has Relation.

Where a Man by not appearing will be subject to great Loss, as of Issues, or his Freehold, or to corporal Pain, as Imprisonment, he may appear on the Day which he has by the Roll, *on which the Writ was awarded*, tho' the Sheriff return not the Writ.

The Day of *Nisi Prius*, and the Day in Bank, are esteem'd in Law as one Day, for some Purposes; e. g. *If the Defendant make Default at Nisi Prius, and an insufficient Protection be cast for him, by Reason whereof the Inquest is not taken, and at the Day in Bank the Protection be disallow'd, the Inquest shall be there taken for Default, whether the Defendant appear at the Day in Bank, or not, but without some such special Reason, the Law looks on them to be distinct Days, as they really are.*

Vid. *supra*,
195.
Bro. In-
quest, 23.

There are *Dies Juridici*, & *Dies non Juridici*, all Days in Term are *Dies Juridici*, but no Days out of Term, (except it be in Affizes.) All Sundays, Ascension-Day, Purification, All-Saints, All Souls, and St. John Baptist's-Day, are *Dies non Juridici*.

The natural Day contains the Space of 24 Hours, from 12 at Night, or 12 the next; therefore in Indictments of Burglary the Offence is said to be committed in *Nocte ejusdem*

(a) Vid. 21
H. 3. Stra.
deanno Bif.
Sextili.

ejusdem Diei. 91 Days make a Quarter of a Year by legal Computation, and 182 Days make half a Year, for the Law reckons not the odd Hours. (a) In the Leap-Year the Day encreasing, and the Day next precedent, shall be reckoned but as one. Regularly 28 Days are accounted a Month in Law, except it be as to the accounting of a Lapse in *quare Impedit*, in which Case the Law computes by Kalendar Months.

A Leper, remov'd by the Writ de *Leproso amovendo*, may sue, but he must appear by Attorney; and an Ideot, Madman, &c. may at this Day bring an Action in their own Names, and prosecute it by others. An Infant may sue by Guardian, or Prochein Amy, by W. 2. 15. but he shall defend by Guardian only.

136.

If a Villein become a Monk profess'd, the Lord can't take him out of the House, but he shall have an Action against the Sovereign of the House. But if such Villein be afterward deraign'd, the Lord may seise him again; and he may seise a secular Priest being his Villein, notwithstanding his holy Orders. The Marriage of a Secular Priest at Law was not void, but voidable by Divorce, which if it were not had in the Life of the Parties, could not be after the Death of either of them. But the Marriage of a Man or Woman profess'd was wholly void, and the Issue Bastards.

And if a Niese be married without Licence, she is infranchis'd during the Coverture, and the Lord can't seise her, but he may have an Action against the Husband.

band; and if she were Regardant, and the Lord make a Feoffment of the Manor to which, &c. and the Husband die, the Feoffor shall have the Nief; for during the Coverture she was severed from the Manor, and the Lord's Interest in her was rather in Nature of a Possibility, than of a Reversion.

K. may infranchise a Villein by making him a Knight, but the Lord may have an Action against them that were the Means thereof.

If the Heir of Land holden by *Kt.* Service had enter'd into Religion before his Age of 14, the Lord should have had a Writ of Ravishment of Ward against the Sovereign. But the Land should have descended to the next Heir, and the Lord had no Remedy as to the Loss of the Land, for it was *damnum absque injuria*. 137. 4 H. 4. 17.

Manumission is properly when the Lord makes a Deed to his Villein to infranchise him, but there are also many implied Manumissions, as Knighthood, &c. If a Villein remain in ancient Demesne a Year and a Day, the Lord can't seise him there. If he be a Priest in K.'s Chapel, he can't seise him in K.'s Presence.

If the Lord make an Obligation, or Lease *T.* to his Villein, or infeoff him, or do any Act that transfers a fix'd Estate, or gives a Cause of Action to the Villein, he thereby infranchises him. But if the Lord bring an Appeal of Felony against his Villein who has been indicted of the same before, he does not infranchise him thereby, for he cannot have him hang'd without it, and 138.

and if the Villein be acquitted on the Appeal in that Case, he can't recover Damages against the Lord. But if the Villein against whom the Lord brings such Appeal were not indicted before, and acquitted on the Appeal, he shall be free, because *W. 2. 12.* gives Damage to the Appellee not indicted before, which in this Case would be illusory, if the Villein should still continue such.

If the Lord make a Lease *W.* to his Villein, or make a Release unto him having nothing in the Land, which is merely void, or attorn to a Grant made unto him, *which transfers nothing from the Lord, but only makes good another's Grant*, he does not infranchise him thereby.

If Ten't *T.* of a Manor, to which a Villein is regardant, infeoff the Villein of the Manor, the Issue may bring a Formedon against the Villein without infranchising him, for he can't seise him till he has recovered the Manor. So if the Ten't of *Kt.'s* Service Land had infeoff'd a Villein and another on Collusion, the bringing of a Writ of Ward against them did not infranchise him, for if the Lord should have entered for the Moiety belonging to his Villein, his Seigniorie would have been suspended, and he could not have had a Writ of Ward against the other, *in respect of the Lord's actual Seisin of the said Moiety.* If the Lord levy a Fine to a Villein of Land in ancient Demesne, this infranchises him, tho' it be afterwards revers'd by a Writ of Deceit, for it was not void, but voidable.

If the Lord bring an Action real or personal, against his Villein, and recover, or be Nonsuit after Appearance, he thereby infranchises him, because he might imprison him, and seise his Goods without Suit; but if the Lord be Nonsuit before Appearance, the bare bringing of the Writ does not infranchise the Villein, (a) *because a Stranger may bring it in the Lord's Name.*

(a) Vid. Co.
L. 145. a.

Nonsuit is always when the Demandant, or Plaintiff, should appear, and makes Default. A Retraxit is when he is present in Court; (as Regularly he is ever, by Intendment of Law, till a Day be given over, unless it be when a Verdict is to be given, and then he is but demandable;) and this is either Privative, when the Entry is, *quod solenniter exactus non venit, sed a secta sua in contemptum Curie se Retraxit, &c.* or Positive, when the Entry is, *quod fatetur se, seu cognoscit se, ulterius nolle proseguere, &c.* It is called a Retraxit, because that is the effectual Word used in the Entry. It is a Bar to all Actions of like Nature or inferior.

139.

Nonsuit before Appearance is never Peremptory, and regularly also Nonsuit after Appearance is not, but in a *quare Impedit* it is, and in that Action a Discontinuance is also Peremptory, because the Defendant shall have a Writ to the Bishop. Nonsuit after Appearance is also Peremptory in a *Nativo habendo*, and the Nonsuit of one Plaintiff in that Action nonsuits both, *in favorem Libertatis*; for in a *Libertate Probanda*, such Nonsuit is not Peremptory, neither is the Nonsuit of one Plaintiff the
Nonsuit

21st 385.

Nonfuit of both. And it is Peremptory not only in an Appeal of Felony, but of Mayhem also, for the Words therein are *Felonice Mayhemavit*; but the Nonfuit of the Plaintiff in an Appeal is not such an Acquittal on which the Defendant shall recover Damages against the Abettors *W. 2. 12. unless, after the Nonfuit, he were arraigned at K.'s Suit upon the Appeal and acquitted.* Such Nonfuit is also Peremptory in an Attaint, but a Discontinuance in an Attaint is not, because there is a Judgment given upon the Nonfuit, but not upon the Discontinuance.

In personal Actions brought by any but Executors, the Nonfuit of one Plaintiff is the Nonfuit of all; except in an *audita Querela*, which is favour'd, because it discharges a Man from Execution; but in real or mix'd Actions, the Nonfuit of one Defendant is not the Nonfuit of both, but he that made Default shall be summon'd and sever'd.

One may be sever'd two Ways. 1. By Summons *ad sequendum Simul*, where he never appear'd. 2. By the Court's Award of Nonfuit without any Summons, and this is always after Appearance.

In a real Action by several *Præcipe* against two or more, Nonfuit as to one, is a Nonfuit as to all, because as to the Defendant it is all but one Writ under one Teste.

Writs of Error, Attaint, *Scire facias*, &c. follow the Nature of those Actions whereon they are grounded.

K. can

K. can't be Nonsuit, but the Attorney General may enter an *ulterius non vult Prosequi*, but an Informer *qui tam*, &c. may be Nonsuit.

After Demurrer join'd, the Plaintiff may be Nonsuit, but by 2 *H.* 4. 7. at a Day given by the Judges to be advis'd after Verdict, he shall not.

After an Award to account, the Plaintiff may be Nonsuit, because it is but an Interlocutory, and no final Judgment.

A Lord can't prescribe to have a Fine of every Ten't that marries his Daughter without his Licence, for it is against the Freedom of a Freeman, that is not bound thereby by a particular Tenure; but there may be a Custom in a Manor that every Ten't that holds in Bondage, the Freehold being in the Lord, shall pay such Fine, tho' his Person be free.

But Gavelkind stands with some Reason, for every Son is a Gentleman alike, and *Burgh Engl.* has its Reason, for the Youngest is least able to take Care of himself. In some Manors the eldest Daughter or Sister alone shall inherit, and in some Gavelkind extends to Brothers as well as Sons.

A Man can't prescribe to distrain Cattle Damage Feasant, and detain 'em till satisfy'd for the Damage at his Will; for it is against Reason that he should be Judge in his own Cause. Therefore a Fine levied before the Bailiffs of *Salop* was revers'd, because one of them was Party to the Fine.

K. John, and his Son *H.* abolish'd the *Irish* Customs, and made the Laws of *England*

140.

141.

land in Force there; it is said, that our Statutes bind them not, *quia non habent Milites in Parlamento*, and this is true as to all those in which Ireland is not particularly named: But by Poyning's Law, all Statutes made in England before the 10th Year of H. 7. are of Force in Ireland.

Of Rents.

142. OF Rents there be three Sorts. 1. Rent Service. 2. Rent Charge. 3. Rent Seck. To which may be added Rent reserv'd on a Lease *W.* called Rent distreinable of Common Right, which is not properly Rent Service, because Fealty, which is incident to all Rent Service, is not incident to it. Rent is reserv'd out of the Profits of the Land, and is not due till they are receiv'd. It may by Act of Law issue out of Services, as a Seigniorie does out of a Mesnalty immediately, and mediately from the Land. Any Thing may be reserv'd that lies in Render, Office, or Attendance, but not the Profits themselves.

One can't distrein for Rent by Night, but for Damage Feasant one may.

Rent Service is where Ten't in Fee hold of his Lord, or Donee, or Lessee *L.* or Ten't hold of him in Reversion by Rent, and it is so called, because Fealty is incident to it. Where the Estate on which it is reserv'd may pass without Deed, it may be reserv'd without Deed.

No Rent reserv'd at this Day on a Gift, or Lease, is a Rent Service, unless the Re've

our Statute of Mortmain, as to all other Statutes, Year of
 ev'n be in the Donor or Lessor, but it
 needs not be immediately expectant on the
 state of the particular Ten't in Possession.
 And, before the Statute of *quia Emptores*,
 one had made a Feoffment in Fee, or a
 lease *L. Rem'r* in Fee, reserving Rent, such
 Ten't had been a Rent Service. And if he
 had made no Reservation, the Ten't should
 have holden of him by the same Services
 by which he held over.

143.

Fealty is an Incident inseparable from
 the Reversion, but the Rent is separable.

If a Man at this Day reserve to him and
 his Heirs a Rent upon a Feoffment, or any
 other Conveyance, whereby the whole
 estate in Fee passes, with a Clause, That
 it shall be lawful for him and his Heirs to
 distrein, such Rent is a Rent-Charge, be-
 cause the Land is charged with such Dis-
 tress by Force of the Writing only, and not
 of Common Right. If it be to the Value
 of the 4th Part of the Land, or more, it is
 call'd a Fee Farm.

If one feis'd of Land grant a Rent out of
 it in Fee, *T. L. &c.* with a Clause of Dis-
 tress, such Rent is also a Rent-Charge :
 But whether a Rent be reserv'd on a Feoff-
 ment, or granted by the Ten't out of Land,
 if there be no Clause of Distress, it is a
 Rent-Seck, and Remediless, unless the Feo-
 dor or Grantee can gain a Seisin thereof.

144.

If a Rent be granted payable at 4 Feasts,
 and that for Default of Payment on Demand
 it shall be lawful to distrein; in this Case, a
 Demand made by the Grantee after any of
 the Days is good to enable him to distrein,
 but

but where a Re-entry is reserved for Non-Payment of Rent on Demand, on such a Day, the Demand must be made on the very Day.

Vid. supra,
72.

Rent can't be reserved, or granted out of an incorporeal Inheritance, and it can only be reserv'd on a Conveyance by which an Estate passes, and therefore it can't be reserv'd on a Release by Dis'see to Dis'sor. But it may be claim'd by Prescription.

It is said, that a Rent may be reserv'd on a Feoffment by Deed Poll, because the Words, by which it is reserv'd, are the Words of the Feoffor, and the Feoffee agrees to it by accepting of the Deed, and for this Cause a Writ of Annuity will not lie for such Rent, whether it were reserv'd by Deed Poll, or indented, nor will it lie for Rent granted for Owelty of Partition, (*for it is merely in the Realty, and is in Nature of the Land descended.*) Nor for any other Rent which might at Law have been granted without Deed, as Rent granted to a Woman in lieu of her Dower, whether it be granted by Deed or without, *because such Rents are granted in lieu of a Right which the Grantee has to the Land by Act of Law, and therefore are vested in the Grantee in such Plight as the Land did, or ought to have done.*

Vid. Co.
L. 169.

An Annuity is a yearly Payment of a certain Sum in *F. T. L.* or *T.* charging the Grantor's Person only; and not only the Grantee in Fee, but his Heirs, and Assigns may have a Writ of Annuity against the Grantor, but not against his Heir, unless

he be specially named in the Grant. A Grant of Annuity by two, gives but one Action against both, unless there be the Words, *obligamus nos & utrumque nostrum*, in the Grant, which gives an Action against either of them, but one Satisfaction only.

The Grantee of a Rent Charge has his Election to bring a Writ of Annuity against the Grantor, or to distrein for the Arrears of the Rent. For wherever a Man has two Remedies for the same Thing, he may chuse either of them. And if the Ten't of the Land, and a Stranger grant a Rent out of the Land, tho' this be *prima Facie*, the Grant of the one, and the Confirmation of the other, yet the Grantee may either distrein for the Rent, or have a Writ of Annuity against both. But if the Grantee of a Rent Charge bring a Writ of Annuity and count thereon, he can afterwards bring a Writ of Annuity only; so if he distrein for the Rent, and avow for it in a Court of Record, or bring an Assise for it, and make a Plaint thereon, his Election is determin'd, and he can afterwards take it only as a Rent; for *Electio semel facta non patitur regressum*. If a Rent Charge be granted to *A.* and *B.* and their Heirs, *B.* distreins, and avows for himself, and makes Conufance for *A.* and dies, this binds *A.* so that he can never after have a Writ of Annuity. But where a Man may have an Action of Account, or Debt, and brings an Action of Account and is Nonsuit therein after Appearance, he may have Debt, for both Actions charge the Person only.

L

If

If the Wife of the Grantee of a Rent in Fee bring a Writ of Dower against his Heir, he cannot plead in Bar of her Dower, that he claims it as an Annuity, for he can't determine his Election by Claim, but by suing a Writ of Annuity, neither can he have it as an Annuity for the 2 Parts, and a Rent for the 3d.

As to Elections, these Things are to be observed.

§ 45.

1. Where no Interest passes to a Grantee before Election made by him, (*as where I grant to a Man one of my Horses in my Stable,*) the Election must be made in the Life of the Parties, or the Grant becomes void by his Death.

2 Rep. 36.

2. But where an Interest passes, as when one Thing is granted, and the Grantee has Election to take it one Way or another, (*as by way of Use executed by the Statute or Conveyance at Common Law,*) there the Election may be made by the Heir or Executor.

3. where an Election is given to several Persons, Election first made by any of the Parties shall stand.

4. Where an Election is given of two several Things, he that is to do the first Act shall have the Election, as if one grant an Annuity, or a Robe yearly, or make a Lease reserving a Rent of 20 s. or a Robe yearly, &c. the Grantor or Lessee, because they are to be the first Agents, by Payment of the one, or Delivery of the other, may chuse to pay either of them; but if I give you one of my Horses in my Stable, or 2 Loads of Wood to be taken in such a Place

you may chuse which you like best, for in this Case I am not to be the first Agent by Delivery of them, but you, by taking of them.

5. He that has such Election may often lose it by his own Default, as if *A.* grant to *B.* 20 s. or a Robe, to be paid once at such a Feast, and fail of Payment at the Day, *B.* may bring his Action for either; so if he infeoff *B.* of two Acres, to hold the one for Life, the other in Fee, and *B.* before he has made Election to have a Fee in one of them, make a Feoffment of both, the Feoffor may re-enter into either of them for the Forfeiture. But if one grant an Annuity, or a Robe payable at the Feast of Easter, for *Y. L. T.* or in Fee, and fail of Payment, the Grantee shall not have his Election of either of them, but must bring his Writ of Annuity in the Disjunctive, for if he should bring it for one of them without mentioning the other, the Grantor would in this particular Case lose his Election for ever after, because after Judgment once had on a Writ of Annuity the Grantee can't have a Writ of Annuity afterwards, but only a *Scire Facias* on the said Judgment; yet it seems that if a Lessor reserve yearly a Rent, or a Pair of Spurs, and the Lessee fail of Payment at the Day, the Lessor may distrein for either of them, for in this Case the Lessee loses his Election only Pro hac Vice.

Wherever Goods are distrein'd, the Owner may either replevy them by Writ, which is by Common Law, or by Plaint, which

1 Ro A.

725.

L. 90 b.

was given by *Marlbridge* 21; and tho' one grant a Rent with a Clause of Distress, and grant further that the Distresses taken shall be Irreplevisable, yet may they be replevied for such a Restraint is against the Nature of a Distress, and no private Man can alter the Common Course of Law.

To replevy Goods, is to deliver them to the Owner upon Pledges to prosecute, (which are required by Common Law,) and also Pledges to make a Return of the Things distreined, if Judgment shall be against him, that brings the Replevin, which are required by *W.2.* 2.

The Sheriff may take a Complaint, by Force of the said Act, out of the County Court, and make Replevin presently, for it would be inconvenient to stay till the County Day.

He that brings a Replevin, must either have an absolute Property in the Goods distrein'd, or at least a special Property, as in Goods taken to manure his Lands, and such like: And if the Beasts of several Men be taken, they can't join in a Replevin. If the Villein's Goods be distrein'd, the Lord may replevy them, but if they be taken by a Trespasser, *claiming a Property in them*, he can't replevy them, because the Villein had but a Right.

Frz Replevin 43.

If the Defendant upon Complaint made claim Property, the Sheriff can't proceed, but the Plaintiff must sue a Writ of *Proprietate Probanda*, (because Property can't be tried but by Writ,) and if it be found thereupon for the

the Plaintiff, the Sheriff must deliver the Distress to him, but if it be found for the Defendant, the Sheriff can do nothing. But this being but an Inquest of Office, the Plaintiff may afterwards replevy by Writ, and if the Sheriff return the claim of Property, it shall be put in Issue, and determined in the Common Pleas.

None can claim Property in a Replevin by his Bailiff, or Servant, because he should be fined for his Contempt, if it be found against him, which can't be done in this Case, because *nemo punitur pro alieno delicto*. But this must be understood where Replevin is by Plaintiff in the Country, in which Case a false Claim of Property is fineable, in respect of the Delay, but one may claim a Property in a Court of Record by a Bailiff.

1 Lev. 90.

If the Ten't's Cattle be distrein'd, and the Mesne, who is bound to acquit him, put in his Cattle in lieu of the Ten'ts, he shall bring a Replevy for them, tho' they were not distrein'd.

If one grant a Rent Charge with a *Proviso*, that neither the said Grant, nor any Thing therein contained, shall charge his Person with a Writ of Annuity, by such *Proviso* the Land only is charged. And tho' there be two Negatives in such *Proviso*, yet they shall not make an Affirmative against the manifest Intent of the Party. But a *Proviso* that would take away the whole Effect of the Grant, as if one grant a Rent out of Land in which he has nothing, provided that it shall not charge his Person, is

146.

void. So is a *Proviso* that is repugnant to the expresse Words of the Grant; as where one grants a Rent Charge out of Land, provided that it shall not charge the Land; and where a *Proviso* is good at first, and afterwards it happens that the Grantee, or his Executors can have no other Remedy but that which was restrain'd, they shall have it notwithstanding such Restraint; as if *A.* grant a Rent to *B.* for *L.* with a *Proviso* that it shall not charge his Person, yet *B.*'s Executors shall have an Action of Debt for the Arrears during *B.*'s Life.

247.

If *A.* grant to *B.* that if *B.* be not yearly paid so much at *Christmas*, that then he may distrein for it in the Mannor of *C.* or if he bind his Mannor of *C.* and all his Goods in it to the Payment of a yearly Rent to *B.* by such Grants *B.* has a good Rent Charge and may distrein for it, notwithstanding these Words are added, *ad distringendum per Ballivum Domini Regis*, for the Distress is for the Benefit of the Grantee, and if the *K.*'s Bailiff distrein, he does it as Servant to the Grantee, and what the Grantee may do by his Servant, he may do by himself, or another, but *B.* can't have a Writ of Annuity by Force of such Grants, because *A.* does not grant to him any Annuity, but only that he may distrein, &c.

Notwithstanding such Grant of a Distress for Rent in the Mannor of *C.* shall amount to a Grant of a Rent out of *C.* because otherwise the Grantee could not have an Affise; yet if one grant a Rent out of *D.* and a Distress for it in *C.* the Rent wholly
issued

issues out of *D.* and *C.* is only charged with the Distress, for these Reasons,

1. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

2. If the Rent issued out of *C.* the bringing of a Writ of Annuity would not discharge it, for such Writ would lie upon the express Grant out of *D.* without any Dependence on the Grant of the Distress in *C.* and then the Grantor would be twice charg'd.

3. It is allow'd that it would only issue out of *D.* if *D.* and *C.* were in different Counties, and the Reason is the same where they lie in one.

4. If *D.* be evicted by an elder Title, or if the Grantee purchase Part of *D.* the Rent is extinct, but it shall not be extinct by his Purchase of Parcel of *C.* as it would be, if it issued out of it.

One entire Rent can't be partly a Rent Charge, and partly a Rent Seck; therefore, if a Rent be granted out of three Acres with a Clause of Distress for the Whole in one of them only, this is a Rent Seck for the Whole. So if Rent be granted in Fee to two, with a Clause of Distress to one of them only; for it can't be a Rent-Charge as to one, and a Rent Seck as to the other; yet the Distress is an Appurtenant to the Rent, and if he to whom it is granted die, it shall go to the Survivor, and if both of them grant the Rent over, the Grantee shall distrein. If a Rent be granted to *A.* in Fee, with a Distress for Life, this is a Rent

Charge during his Life, and a Rent Seck after; but if the Distress be granted but for Years, it is not a Rent Charge at all, because the Freehold is always Seck. If a Rent be granted for Life out of a Term for Years, and a Freehold, with a Clause of Distress in the Whole, the Whole shall issue out of the Freehold, and the Term is only charg'd with a Distress; but if it had been granted out of the Term alone, it should have issued out of the Term, and the Lands had been charg'd during the Term, if the Grantee had liv'd so long.

A Grant of 20 s. *de qualibet Acra terre*, charges each Acre, so that if there be 20 Acres it amounts to 20 l.

A. bargains and sells to *B.* and before Inrollment, both of them grant a Rent Charge to *C.* it is now *A.*'s Grant, and *B.*'s Confirmation, after Inrollment it is *B.*'s Grant, and *A.*'s Confirmation.

148. *a.* If the Lord purchase the Fee of Part of the Tenancy, or if a Lessee surrender or forfeit Part of his Land to the Lessor, the Rent, by which the Ten't holds, shall be apportion'd according to the Value of the Land remaining in his Hands, and extinguish'd for the rest; and if Lessor grant over Part of the Rev'n, his Grantee shall have Part of the Rent.

If Lessor disseise his Lessee of Part of the Land, the Rent shall be suspended in the Whole; but if he come to Part of the Land by Act of Law, the Rent shall be apportion'd for Part, and suspended for the rest: It may likewise be suspended in Part by the

Act of a third Person, as if there be two Parceners of a Seignior, and one disseise the Ten't, the Rent shall be suspended for her Moiety only; but it is said, that if the Ten't make a Gift in T. or a Lease to the Lord of Part, the Seignior shall be suspended for the Whole. *Sed (a) Q.*

If the Grantee of a Rent Charge in Fee purchase Parcel of the Land in Fee, the whole Rent is extinct, because it is entire, and against common Right, and issuing out of every Part of the Land, *and wholly depends upon the Deed, which creates it without a Tenure, against the natural Course of the Law, and therefore must be strictly pursued;* but if the Grantor grant that he may distrain for the same Rent in the Residue of the Land, this amounts to a new Grant. *A. grants to B. a Rent for L. and by the same Deed grants that B. and his Heirs shall distrain for the same Rent, this amounts to a new Grant of a Rent in Fee.*

But the Grantee of a Rent, or Annuity of 20 s. yearly, may release 10 s. or more, or less, and distrain for the Residue, or he may grant over 10 s. Parcel thereof, and thereby the Annuity, or Rent is divided; but Part of the Land cannot be discharged without discharging the Residue.

When one extinguishes a Rent Charge, (which he has by the express Words of the Grant,) by purchasing Part of the Land, which is his own Act, he cannot afterwards have a Writ of Annuity, which is given by Implication only: But where a Rent deter-

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mince

(a) 2 Lev.
43 44
1 Ven. 277.

mines by the Act of God, as where Ten't *pur autre Vie* grants a Rent for 21 Years, and *cestuyque Vie* dies during the Years, or where it is defeated by the Eviction of the Land charg'd by an elder Title, the Grantee shall have a Writ of Annuity.

Co. L. 149.
b. 150. a.

A Rent Charge may be suspended in Part, or extinct in Part by Act of Law, as if Part of the Land charg'd descend to the Grantee, or be recover'd by him as Heir to his Ancestor, who had alien'd the same within Age, or while he was *Non Compos*; or if the Rent descend to the Ten't of Part of the Land. So if a Man grant a Rent Charge in Fee out of his Land to one of his Daughters, and die seisd of the Land, and a Moiety thereof descend to the Grantee, the said Moiety is discharg'd of the Rent both in her Hands, and in the Hands of her Feoffee, and the other Moiety in the Hands of her Sister, is charg'd with a Moiety of the Rent. The Husband makes a Feoffment, and the Feoffee grants a Rent out of the Land to the Wife, the Husband dies, the Wife by Custom recovers a Moiety for her Dower, she shall have but a Moiety of the Rent, for tho' by Relation her Dower be above the Rent, yet such Fictions of Law are always equitable. But, in all these Cases where the Rent Charge is apportion'd, the Writ of Annuity fails, for that must be grounded on the Deed on which it was granted, and the Personalty is indivisible according to the Rule.

Annuity

Annua nec debitum Judex non separat ipsum.

And for the same Reason, if the Fee of Part of Land extended on an Execution descend to the Conusee, all the Execution is avoided, for the Duty being Personal can't be divided.

If Grantee of a Rent Charge grant the same to the Ter-tenant, and a Stranger, it shall be extinct for a Moiety.

If a Man seis'd of two Acres, of the one in *T.* and of the other in Fee, grant a Rent out of both, and die, and the Acre in *T.* descends to the Issue, the whole Rent Charge shall issue out of the other Acre. So if one grant a Rent out of two Acres, and afterwards one of them be evicted either by a Stranger, or the Grantee himself, by a Title Paramount, as for a Condition broken, &c. the Whole shall issue out of the other Acre, for the Acre which is evicted is absolutely discharg'd from the Rent, and the Grantor shall not, to avoid his own Grant in the Whole, or in Part, take Advantage of the Weakness of his own Estate.

148. *va*

But if a Man seis'd of one Acre in *T.* and of another in Fee, make a Lease of both reserving Rent, and die, and the Lease of the Acre in *T.* be avoided by the Issue, the Rent shall be apportion'd. So where a Man makes a Lease of two Acres, reserving Rent, on Condition that the Lessee shall have Fee in one of them on doing such an Act, if the Lessee perform the Condition, the Rent shall be apportion'd.

apportion'd, because it is incident to the Rev'n, yet by Relation, the Lessee has the Fee-Simple, *ab initio*.

If a Lessee *L.* grant a Rent to his Lessor out of an Acre leased to him by the Lessor, and out of another Acre which he has in Fee, and after the Lessor enter for a Forfeiture into the Acre leas'd by him, or recover it in an Action of Waste, the Rent shall not be extinct, for tho' the Lessor claim Part of the Land charg'd under the Lessee, yet since it is given him by Law for the wrongful Act of the Lessee, the Lessee shall not take Advantage of it to extinguish the whole Rent; nor shall it wholly issue out of the Land in Fee, because the Lessor claims the other Acre under the State of the Lessee, and subject to his Charges during the Term, and therefore it shall be apportion'd.

149.

Entire Services shall be multiplied by a Stranger's Purchase of Part of the Land, holden by them, but they shall be extinguished by the Lord's Purchase of Part of the Land, unless they be *pro bono Publico*, as for the Defence of the Realm, or Advancement of Justice, or consist in Works of Charity, or Piety, for such Services shall remain after the Lord has purchas'd Part of the Land. Three Jointenants hold by a Horse, the Lord recovers *in Cessavit* against two of them, the whole Service is extinct.

Notwithstanding a Common *sans Nombre*, can't be apportion'd, because it is uncertain, yet if Part of the Land charg'd therewith descend to the Commoner, the Com-

mon still remains, but the Ter-ten't shall not be prejudiced thereby.

If Lord by *Kt.* Service had purchas'd Part of the Land so holden, the Homage and Fealty remain'd, albeit they were entire, because they cost the Ten't nothing. But the Escuage should have been appor-tion'd according to the Value of the Land. If the Ten't had also holden by an Heriot, the Heriot should have been extinct, be-cause it is entire and valuable, by which it appears that entire Services, which are va-luable, shall be extinguish'd by the Lord's Purchase of Part of the Land, whether they be annual or not. But if a Heriot be due to the Lord by Custom on the Death of eve-ry Ten't it shall not be extinct by the Lord's Purchase of Part, *for the Ten't of Part is still a Ten't.*

A Rent Service may become a Rent Seck by the Grant of him that has it se-vering the Fealty from it. Therefore, if there be Lord and Ten't by Fealty and Rent, and the Lord grant over the Rent in Fee, or *T.* saving the Fealty, the Rent pass'es as a Rent Seck, for the Land is still holden of the Lord because of the Fealty, which always makes a Tenure, and it can-not be immediately holden of two Lords at the same Time; and notwithstanding, in such Case the Lord grant further, that the Grantee shall distrain, yet the Rent shall pass as a Rent Seck, for the Lord had no Power to make such Grant. But if such a Lord release to the Ten't all his Right to the Land, saving the Rent, it continues a
Rent

150.

Rent Service. If one make a Gift in Fee reserving Rent, and then grant over the Services, the Fealty, as inseparably incident to the Rev'n remains in him, but the Rent shall pass, and yet it shall be but a Rent Seck in the Hands of the Grantee. If two Co-parceners of a Seigniori make Partition, and the Fealty be allotted to the one, and the Rent to the other, it becomes a Rent Seck. If there be Lord and Tenant by Fealty, and Suit of Court, and the Lord grant over the Fealty, the Suit of Court is gone, for it can't be due to the Grantor, because he ceases to be Lord, nor to the Grantee, because he can keep no Court. If a Rent Service, which is Part of a Manor, become a Rent Seck, by the Lord's Release of the Fealty to the Tenant, or by the Lord Paramount's Purchase of any of the Tenancies, it continues Part of the Manor; but the Nature of it is so far chang'd, that, in an Assize for it, all the Ter-ten'ts must be nam'd, as they must be in Assises for other Rents Seck, or Rents Charge.

151. The Lord of whom Land was holden by Homage, Fealty, and Rent, could not by his Grant sever the Homage from the Fealty, while the Homage continued, but he might have releas'd the Homage saving the Fealty. If he had granted over the Rent, or suffer'd a Recovery thereof by Consent, the Homage should not have pass'd with it; but a Recovery of the Rent by an elder Title had inclusively recover'd the Homage, because no *Præcipe* did lie for the Homage, but

but only for the Rent. Yet if there be Lord and Ten't by Fealty and Rent, and the Ten't grant over the Rent, the Fealty shall pass as incident to it, unless it be expressly excepted.

Before 12 Car. 2. 24. Homage and Escuage did necessarily make a Tenure, as Fealty still does at this Day, and the Lord had an inseparable Right to distrain for them.

If one make a Gift in *T.* or a Lease *L.* or *T.* reserving Rent, and grant the Rent, saving the Rev'n, it becomes Seck, yet at Law it could not pass without Attornment; but if the Rev'n be granted for Life, the Rent passes as a Rent Service, for the Services pass by the Grant of the Rev'n, without saying *cum Pertinentiis*, but the Rev'n passes not by the Grant of the Services, for *Accessorium sequitur, non ducit suum Principale*.

152.

If there be Lord Mesne and Ten't, and the Lord purchase the Tenancy, the Mesnalty is extinct, for the Lord still holds of the Lord next above him, and if he should also hold of him that was Mesne, then he should hold the same Land immediately of several Lords, which is against the Rules of Law. Nor is it against Reason that this should extinguish the Mesnalty, for it is no more to the Mesne's Prejudice, than the first Creation of the Mesnalty was to the Lord's. And if the Ten't make a Gift in *T.* Rem'r to *K.* he extinguishes all the Mesnalties, for the Fee-Simple in *K.* can be holden of no one, and the Fee-Simple of the Mesnalties being extinct, there can't be

9 Rep. 134.
b.

(a) Contra
Co.L. 305.b

153.

be a particular Estate thereof, for the particular Estate, and the Rem'r being as one Estate in Law, the Rem'r can't be discharged of the Mesnalty, and the particular Estate remain charg'd. And it is said that the Lord may likewise extinguish a Mesnalty, by confirming the Estate of the Ten't to hold of him in (a) Frankalmoine, or by releasing to him all his Right. When the Mesnalty is extinct in the Manner aforesaid, he that was Mesne shall distrain of common Right, for so much as the Rent paid to him by the Ten't exceeded that paid by him to the Lord, which remaining Rent is call'd a Rent Seck by Surplusage. And the Conusee of a Statute that has Rent reserv'd on a Lease extended and deliver'd to him shall distrain for it, because he comes to it by Course of Law.

If he that has a Rent Seck be once seisd of any Part thereof, and the Rent be afterwards behind, he ought to go by himself or some other to the Land, either on the Day of Payment, or after, and demand the Rent at the House, or on any Part of the Land, and if the Ten't deny it, this is a Dis's'in of the Rent, or if he be not ready to pay, or be absent, this is a Denial in Law, and a Dis's'in, for which an Assise lies; but the Grantee must make a Demand of the Rent, whether the Ten't be present or absent, for he can't be disseis'd thereof unless he demand it. *And if the Ten't be ready on the Land to pay it on the Day, and there be none on the Part of the*

Grantee

Grantee to receive it, the Grantee (a) can't (a) 7 Rep. before the next Day of Payment make the 29. Ho. 207. Ten't a Dis'sor but by a personal Demand of the Rent from the Ten't himself upon the Land, for no Man shall be liable to pay Damages, &c. without a wilful Fault. (b) If Ren't be granted out of one House (b) Cro. Co., payable at another, it may be demanded at 503. either.

If one make a Lease L. of Land in two Counties reserving Rent such Rent is entire, and the Lessor may in either County distrain and avow for the Whole: Or he may have an Affise in *confinio Comitatus* by 7 R. 2. 10. whether the Counties are adjoining or not, but the Justices shall have but one Patent, tho' (c) the Writs be several, (c) F. N. B. 180. a. and one may have such an Affise for Rent issuing out of more Counties than two; and by Common Law, if divers Manors, in divers Counties, be holden by one Tenure, the Lord may have several Writs of Customs and Services in each County, and Count according to his Case, but if the Ten't do *Cesse*, the Lord can't have several Writs of *Cessavit*, for the said Writ is given by (d) Statute, and the Form therein prescribed must be strictly pursued. (d) W. 2. 21.

If the Grantee of Rent recover in Affise of Novel Dis'sin, and be after disseis'd again by the same Dis'sor, he shall have a Writ of Re-disseisin by 20 H. 3. 3. which Statute only mentions Re-disseisin after Recoveries by Affise, or Confession, before Justices in *Eire*, and yet it is said to extend to Recoveries on Demurrer, &c. as well

Vid. 2 Inst.
417.

well before other Justices as those, *sed* for if this be so, to what Purpose was W. 26. made, which provides for these Cases and seems to suppose that they were within the Purview of 20 H. 3.

The first Recovery must be in Assise of Novel Dis's'in, but if it were by a Writ of Right Close, or Assise of fresh Force, no Re-dis's'in lies.

Every Writ of Re-dis's'in must be between the same Dis's'ee and Dis's'or that were Parties to the first Recovery, where *Idem* is taken for *non alius*; therefore if a Dis's'ee recover in an Assise against two, and after be disseis'd by one of them, he may have a Re-dis's'in against him, for here is no new Defendant not guilty of the former Dis's'in. So where Parceners, or Jointenants are disseis'd, and recover, and make Partition, and then are re-disseis'd, they shall have several Re-dis's'ins, for here is no new Plaintiff, nor wrong'd by the first Dis's'in. If a *Feme Sole* recover in Assise, and take Husband, and they are re-disseis'd, they shall have a Re-dis's'in, for the Husband only joins with the Wife for Conformity, so that in Effect the Dis's'ee is the same. If one guilty of a Re-dis's'in make a Feoffment, the Dis's'ee shall have a Re-dis's'in against him and the Feoffee, for the Right of bringing this Action vested in the Dis's'ee, shall not be defeated by the Feoffment. But if a Dis's'ee recover against one, and afterwards be re-disseis'd by him and another, or if he recover against a *Feme Sole*, and then be re-disseis'd by her, and another whom she after

ward

wards marries, he can't have a Re-diss'in, for here another must be join'd in it, who was not guilty of the first Diss'in. In an Affise against *A.* and *B.* *A.* is found Diss'or, and *B.* Ten't, the Plaintiff recovers, and afterwards is disseis'd by *B.* he shall not have a Re-diss'in against him, because he disseis'd him but once.

The Words of the Statute are, *de eodem Tenemento, &c.* yet if one be re-disseis'd of Parcel of that which was formerly recover'd; or if one recover a Rent Service, which after becomes a Rent Seck by Surplusage, and then be re-disseis'd thereof; or if Ten't in *T.* recover in Affise, and then become Ten't in *T. Apres, &c.* and be re-disseis'd; or if one recover Land to which Common is appurtenant, and then be re-disseis'd of the Common; in all these Cases he may have a Writ of Re-diss'in.

Affise is sometimes taken for a Jury, sometimes for the whole Writ of Affise, sometimes for an Ordinance to put Things into a certain Rule.

Albeit the Words of the Writ of Affise be, *quod vicecomes faceret duodecim videre Tenementum, &c.* yet by ancient Course he must return 24.

Every Juror ought to be *Liber & Legalis* of the Neighbourhood, sufficient in Understanding and Estate, and indifferent as he stands unsworn.

Either Party may have his Challenge either to the Array of the whole Jury, for some Default in the Officer that return'd

turn'd it, or to the Polls, *i. e.* to the particular Jurors.

Co. L. 157.
b.

A Challenge is either Principal, or to the Favour; a principal Challenge is grounded on such a manifest Presumption of Partiality, that if it be found true, it unquestionably sets aside the Array, or the Juror, but a Challenge to the Favour leaves it to the Discretion of the Triers. There are many principal Causes of Challenge to the Array, as if the Officer return any Juror at the Parties Denomination, or that he may be more favourable to one Party than the other, or if the Array be return'd by a Bailiff of a Franchise, and the Sheriff return it of himself, in which Case the Party should lose his Challenges, *for a Default in the Bailiff, because the Return on Record is in the Sheriff's Name; but if the Sheriff return one within a Liberty, this is good, and the Lord of the Franchise is put to his Action against him.* It is also a good Cause of a principal Challenge if no Knight be returned in an Attaint, or when a Lord of Parliament is Party, either sole, or joint with others; but it is sufficient if a Knight be return'd, whether he appear or not. The *K.* may take a principal Challenge, or to the Favour, and it shall be tried according to the usual Course, and when he is a Party or in Case of Life, the Subject may take a principal Challenge, but not to the Favour. If the Array be challenged on both Sides, or return'd by one that has no Liberty, or if a Bailiff return a Juror that is not within his Liberty, the Array shall be quash'd.

If the Sheriff be liable to the Distress of either of the Parties mediately or immediately, or if he be his Servant, or Officer in Fee, or of Robes, or his (a) Counsellor, or Attorney, or have Part of the Land depending on the same Title, or if he has been Godfather to a Child of either of the Parties, or either of them to his, or if either of them have an Action of Debt against him, or if an Action of Battery or such-like, which implies Displeasure, are depending between them. These are principal Challenges to the Array, and such Exceptions against a Juror, are principal Challenges of the Polls. But if either of the Parties be subject to the Distress of the Sheriff, &c. or if the Sheriff, &c. have an Action of Debt against either of the Parties, these are Causes of Challenge to the Favour only, *for the Sheriff, &c. thereby is not under the Party's Influence, but the Party under his.*

Consanguinity, how remote soever, between the Sheriff, or Juror, and either of the Parties, or Affinity by Marriage of either Party himself with the Cousin of the Sheriff, or the Juror, or *à converso*, are Causes of principal Challenge to the Array to the Polls: But if the Marriage be between the Son of the one, and Daughter of the other, it is a Cause of Challenge to the Favour only. He that challenges *the Array* a Juror for Cousenage, must shew how the Party is Cousin, but if it be found that he is Cousin, it is sufficient, whether it be found in the Manner alledged or not. *Note, That a Bastard can have no Kindred.*

(a) But by Finch of Law, 402. These are Challenges to the Favour only.

Co. L. 157.
a.

Two

Fitz Chall.
102.

Co. L. 157.
b. 158. a.
Cro. Ja. 547.

Two Strangers made up a Panel fairly and the Sheriff return'd it, the Array was challeng'd for this Cause, and the Challenge was over-rul'd.

If the Defendant may have a principal Challenge to the Array, the Plaintiff may alledge it, and pray Process to the Coroners, and if he alledge a good Cause against any of them also, he may pray Process to the rest, if against all of them, the Court shall appoint certain Elifors, against whose Return no Challenge can be had; but the Plaintiff can't have such Process to the Coroners, &c. unless the Defendant will confess such Cause alledged by the Plaintiff to be true, and if he will not confess it, the Process shall go to the Sheriff, and the Defendant shall not challenge the Array for that Cause. But the Defendant can't alledge such Matter, and pray Process to the Coroners. *For it shall not be intended that the Plaintiff to delay himself, will challenge the Array without some actual Partiality* and when the Array is quash'd, Process shall be awarded to the Coroners, &c. *supra.* Note, When Process is once awarded to the Coroner's &c. for the Sheriff's actual Partiality, the Entry is, *Vice-comes non intromittat*, and in such Case, Process shall not afterwards be awarded to any new Sheriff, but where it was awarded to the Coroners, for that the Sheriff is Ten't, &c. it may be awarded to a new Sheriff.

Co. L. 158.
2.

Challenges to the Polls are four-fold
1. Peremptory, 2. Principal. 3. To the Favour. 4. For not being of the Hundred.

1. A Peremptory Challenge, is when a Party challenges a Juror without shewing any Cause; at Law one indicted or appeal'd of Treason or Felony, or alledging Matter to avoid an Outlawry thereon, might, *in favorem Vitæ*, have challenged peremptorily 35. But now in Case of Petit-Treason, Murder or Felony, he can challenge but 10. After one has taken his peremptory Challenges, he may challenge, for Cause, as many more as he will; and if he have challenged one for Cause, and that be found against him, he may after challenge him peremptorily.

Co. L. 157.
1 Lev. 61.
Contra.

In Appeal against divers, if the *Venire* be Joint, a Juror challenged peremptorily against one, shall be drawn against all; but if the *Venire's* be several, he may be drawn against one, and remain as to the others.

Co. L. 158.

K. at Law might challenge peremptorily as many as he would, but at this Day by 35 *Ed.* 1. he must shew Cause, *but he is not bound to shew it before the Pannel is gone through, as a Subject must.*

1 Vent. 309.
310.

A Peer can't challenge any of his Peers.

2. Principal Challenges of the Poll are four-fold.

The First is in Respect of the Dignity of a Juror, as if a Peer of the Realm be return'd on a Jury, he may either be challenged, or challenge himself.

The Second is in Respect of some Defect of the Juror, either in his Birth, as if he be an Alien; or in his Condition, as if he be a Villein; or in his Age, as if he be a Minor; or in his Estate, as if he have no Freehold

(a) 1 Ven.
366.

hold in the same County, out of ancient Demesne, at the Time of his Appearance, either in his own Right or another's. But by 23 H. 8. 13. *Inhabitants in corporate Towns, worth 40 l. in Goods, may try Felonies in Sessions, and Gaol-Deliveries for such Towns.* (a) *And this is not repeal'd by subsequent Statutes concerning Jurors.* 4 & 5 Gu. & Ma. 24. *requires that all Tryals in the Courts at Westminster, or before Justices of Nisi Prius, Oyer and Terminer, or Gaol-Delivery, or General Sessions of the Peace, must be by Jurors, whereof each is worth 10 l. per Annum, of Freehold or Copyhold in the same County, if the Tryal be in England, and by Jurors worth 6 l. per Annum, if in Wales; and Tales Men must have 5 l. per Annum in England, 3 l. per Annum in Wales.*

157.

Vid. supra,
235.

The Third is in Respect of the Affection or Partiality of the Juror, as if he be of Kin to either Party, and if an Action be brought by a Corporation, and the Juror be of Kin to any Member thereof, it is a principal Challenge, and if a Juror be challenged for being of Kin to one Party, it is no Counterplea, that he is of Kin also to the other, for the *Venire* commands the Sheriff to return those that are of Kin to neither.

It is also a principal Cause of Challenge, that the Juror is a Witness nam'd in the Deed, or hath formerly given a Verdict on the same Cause, whether between the same Parties, or others: But this is only a Challenge to the Favour, if the Record be of

ano-

another Court, and not shewn forth, but if it be of the same Court, it is sufficient to shew the Day and the Term.

It is also a principal Challenge that a Juror hath indicted the Party for the same Cause, or hath eaten or drunk at his Charge, or taken Money to give his Verdict, or that he is a Parishioner of the Parish whereof the other Party is Parson, if the Right of the Church comes in Question, or that he hath been an Arbitrator chosen by the Party in the same Cause, and hath treated thereof: But an Arbitrator chosen by both Parties, whether he have treated of the Matter or not, or chosen by one Party, if he has never treated thereof, or a Commissioner chosen by one Party for Examination of Witnesses, and appointed under the Great Seal, can't be challenged principally, but for such Cause one may be challenged for Favour.

The Party himself may labour a Juror to appear, and discharge his Conscience, *but* Hob. 294.
a Stranger doing the same is an Embraceor.

The Fourth is in Respect of some Offence 158.
 of the Juror, as if he be attainted or convicted of Treason or Felony, or any Offence to Life or Member, or in Attaint for a false Verdict, or of Perjury as a Witness, or Conspiracy at K.'s Suit, or in any Suit for K. or Subject, be adjudged to a corporal Punishment, whereby he becomes infamous; so if he be outlaw'd in a criminal or civil Prosecution; and some say if he be excommunicate.

3. Challenges to the Favour are infinite; as if the Juror be a Fellow Servant to the Party himself, or Cousin. &c. to him in Rev'n, which is but to the Favour, because he in Rev'n is not Party to the Record, but it would be a Principal Challenge if he were Party by Voucher, Aid, or Receipt.

(a) 35 H. 8.
1 Ed. 6.
32.

4. Challenges for the Hundred avoided the Array, by *Common Law*, if 4, and by (a) *Statute*, if 6, of the Hundred, where the Cause of Action arose, did not remain on the Jury. But now by 4 & 5 Annæ 16, no Hundredors are requir'd except in *Prosecutions Criminal*, and on *penal Statutes*, because in other Cases the *Venire* shall be, de *Corpore Comitatus*.

(a) Dyer
231 p. 3.
(b) Co. L.
153. 2.

He that (a) takes such a Challenge, must shew in what Hundred the Visne lies, and he (b) must take it before so many are sworn as will serve for the Hundred, and he that is challenged for the Hundred shall not be drawn absolutely, but shall remain *propter Hundredum*.

No Hundredors are required when the Jury comes *de Corpore Comitatus*, or *de proximo Hundredo*, for that the Lord of the Hundred is Party.

If a Person dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was return'd, and sell it before he appear, he is a good Hundredor; but if he sell all his Freehold, he may be challeng'd absolutely.

In an Attaint the Jurors are troubled, and yet the same Number of Hundredors

suffices; if diverse Hundreds are in a Leet, or if the Cause of Action arose in diverse Hundreds, the Hundredors may come from any of them.

One shall not have such Challenge to the Polls as he might have had to the Array. And after one has taken a Challenge to the Polls, he shall not after challenge the Array.

When the Inquest is awarded by Default, the Defendant loses his Challenges, but the Plaintiff does not.

Tho' a Man can't plead a double Plea, yet he may have diverse Challenges, but he must take them all at once. After the Challenge of one Party is tried, and the Juror found indifferent, the other Party may challenge him.

If the Party challenge the Array, and it be found against him, and the same Party challenge the Polls, he must shew Cause presently, *i. e. before the Clerk has gone through the Pannel*, so must the Defendant in Appeals of Felony, and where K. is Party, and so must he that challenges a Juror after he is sworn, and such Cause must arise after he is sworn.

The (a) Array of the Tales shall not be challenged by the same Party, till that of the Principal be tried; but if the Plaintiff challenge the Array of the Principal, the Defendant may that of the Tales; and in that Case one of each Pannel shall try them both.

(a) Bro. Chall. 61. contra.

If the (b) Array of the principal Pannel be quash'd, the same Triers shall not try

(b) 4 H. 7. 2. Bro. Chall. 61. the contra.

the Array of the Tales; but if they affirm the Principal Pannel, they shall try the Array of the Tales.

The Challenge of the Array shall be tried by two of those impannelled, to be appointed by the Court, not more than two without Consent; but when the Court has nam'd two, they may for some special Cause, alledged by either Party, name others. And if the Polls be challenged, *before any of the Jurors are sworn*, the Court shall appoint two Triers, *of those that are impannell'd*, and if they try one, and he be sworn, they three shall try another, and if he be found indifferent, and sworn, the two Triers shall cease, and the two Jurors sworn shall try the rest. *And a Challenge to the Polls taken after any Jurors are sworn, shall be tried by them that are sworn.* If the Plaintiff challenge ten, and the Defendant one, and the 12th be sworn, he shall be added to one of them challenged by the Plaintiff, and the other challenged by the Defendant.

Finch of
Law, 412.

Such Challenges as do not found in Reproach of the Juror, shall be examined on his Oath to inform the Triers.

When the Plaintiff recovers *per visum Juratorum*, there ought to be 6 of the Jurors who have had the View, or have known the Land.

Challenges have been allow'd *in a Proprietate Probanda*, and in a Writ to enquire of Waste.

159.

A Lay-Man having an Interest in Tythe Pensions, or other Ecclesiastical Duties, and

being deforc'd thereof, by any Claiming the same, may have an Assise, or other original Writs by 32 H. 8. 7. for they are made Lay-Inheritances in the Hands of Lay-men, and shall be Assets, Men shall be Ten'ts by Curtesy, and Women endowed of them. The Assise for 'em must be *de Libero Tenemento*, and a special Plaint made. But a *Præcipe* shall be *quod reddat omnes & omnimodas decimas Majores minutas & mixtas infra D. quoquo modo crescen' contingen' ac annuatim renovan'*. But before that Statute, Lay-men had no Remedy for the Recovery thereof.

And by the said Statute, and 2 & 3 Ed. 6. 13. Lay-men, as well as spiritual, shall sue for the not setting out, withholding or refusing to pay Tythes and Offerings, and other Spiritual Duties, in the Spiritual Court, and no other; yet it is a Common Practice to sue for them by English-Bill in Chancery or Exchequer, for it is said, that Courts of Equity had always a Jurisdiction in such Cases, and it seems that the said Statutes only design'd to restrain the Common-Law Courts from assuming a new Jurisdiction and not to take from other Courts a Jurisdiction legally vested in them before. And the 2 & 3 E. 6. 13. enacts, That whoever shall substract predial Tythes, shall pay the treble Value, to be recovered at Law, or the double Value to be recover'd in the Spiritual Court; and tho' it be not said to whom it shall be paid, yet the Owner of the Tythes, whether he be Lay or Spiritual, shall have it, for when a Statute gives a Forfeiture against him that dispossesses another of his Duty or Interest,

Vid. Warr.
485.

the Party wrong'd and not *K.* shall have it. Both Lay and Spiritual Persons may sue in either Court.

If there be Lord and Ten't, and the Lord grant the Rent, saving the Services, and the Ten't attorn; tho' this give a Seisin in Law, as the Delivery of a Deed does when Rent is granted out of Land, yet if the Rent be denied the next Day of Payment, the Grantee has no Remedy, (in Law or Equity.) *Q.* If this be not to be understood of a Grant made without valuable Consideration. But if the Ten't, when he attorns, gives a Piece of Money, or a Ring, or an Ox, or any valuable Thing, in the Name of Seisin of the Rent, this gives such a Seisin as will maintain an Assise the next Day of Payment, if the Rent be denied, tho' it be no Part of the Rent, nor shall be abated out of it. And a Man may have any other real Action for a Rent Seck after actual Seisin thereof once had, as well as for other Rents.

160.

There be seven Causes of Dis'in of Rent Service.

The first is, Rescous of a Distress taken for the Rent behind.

The second is, Resisting the Lord in taking a Distress.

Rescous is *properly* a Setting at Liberty against Law a Distress taken, or Person arrested by Process or Course of Law. But the Lord distrein for Rent when none is due, the Ten't may lawfully make Rescous or Resistance; and so may a Stranger, if his Beasts be distrein'd for Rent when none is behind.

behind. And if the Ten't tender the Rent to the Lord, when he comes to distrein, and yet the Lord will distrein, or if the Lord distrein any Thing not distreinable, as Beasts of the Plow when other sufficient Distress may be taken, the Ten't may make Rescous, so may he if the Lord distrein in the (a) High-way, or out of his Fee. But if the Lord come to distrein, and have view of the Cattle, and the Ten't or any other to prevent the Lord drive them out of his Fee, and the Lord pursue, and distrein them, the Ten't can't rescue them; for in such Case in Judgment of Law they are taken within his Fee, and so shall the Writ of Rescous suppose. But if they go of themselves out of the Fee, or be driven off for other Cause, whether before or after the Lord's View, or if the Ten't drive them off purposely before the View, the Lord can't distrein out of his Fee: *But now by 8 Annæ, If any Lessee shall fraudulently convey his Goods from the Premises to prevent the Lessor's Distress, the Lessor may within 5 Days seise them, &c. as a Distress wherever found. But if they be sold Bona Fide, before the Lessor's Seisure, he can't distrein them.*

None can distrein for Damage Feasant unless the Beasts be Damage Feasant at the Time; therefore if one come to distrein for Damage Feasant, and see the Beasts on his Land, and the Owner of them drive them off purposely to avoid the Distress, and the Ten't distrein them, he may rescue them. If one not guilty be arrested by the Sheriff of his own Authority for Felony, he may

(a) Marl.
15.

161.

rescue himself; but if he had been taken by Force of a *Capias* for Felony, he could not.

The Third is Suing a Replevin *without Cause* by Writ or Plaint, for tho' it be regularly true that a Man shall not be punished for suing Writs in K.'s Courts, the Rule fails in this Case, because it disturbs the Lord of the Mean by which he is to come to his Rent; so the Turning of the Stream is a Dis's'in of the Mill, *nam quia adimit Medium, dirimit Finem*; so to disturb a Man to enter and manure his Land is a Dis's'in of the Land, *qui enim obstruit Aditum, destruit Commodum*.

The Fourth is Inclosure, for the Lord can't break open the Gates, or break down the Inclosures to distrein.

The Fifth is to counterplead the Plaintiff's Title whereby he is delay'd, but to plead *Null Tort, &c.* is no Dis's'in.

W. 2. 25.

The Sixth is to vouch a Record, (*whereby the taking of the Assise is deferr'd,*) and fail of it *at the Day given to bring it in*.

The Seventh is when the Ten't meets the Lord or Grantee, going to distrein for, or demand the Rent, and menaces them in such a Manner, that they dare not go to the Land to distrein for, or demand the Rent behind for fear of bodily Hurt.

And there are 8 Causes of Dis's'in of a Rent Charge, *viz.* all the Causes aforesaid, and also Denial; but Denial is no Dis's'in of a Rent Service, *for he that has such Rent shall not be said to be disseis'd, whilst the proper Remedy given him by Law lies open to him; but the Grantee's Power to distrein may be uncertain*.

certain, because it depends wholly on the Validity of the Clause in the Deed, therefore if he waive it, he shall at least be in as good a Case as if there were no such Clause.

There are two Jointenants, and the Grantee of a Rent Charge distrains, one makes Rescous, both are Dis'sors, for the Distress was a Demand, and the Non-payment a Denial and Dis'in, but the Rescuer alone is a Dis'sor with Force.

And there are 3 Causes of Dis'in of a Rent Seck, viz. Denial, Inclosure, and forestalling the Way, &c.

By 32 H. 8. 37. Executors or Administrators of a Man seisd of a Rent Service, Rent Charge or Seck, in Fee, or Tail, or for L. may distrain, or have Debt for the Arrears incurr'd in the Life of the Testator, or Intestate. But at Law there was no Remedy for Executors, &c. of a Man seised of such Rent to recover such Arrears, as long as the Freehold of the Rent continued, but after an Estate L. in Rent determin'd, the Executors at Law might have had an Action of Debt.

By the said Statute the Action of Debt lies only against him that took the Profits, when the Rent was behind, and his Executors or Administrators; but a Distress may be taken on the Land in the Hands of any claiming by or from him, i. e. under him, but not above him as Lord by Escheat.

But where the Testator or Intestate had no Remedy, the Executors or Administrators have none, as where the Lord grants away his Seigniori before his Death.

* The Lord's Executors can't distrain him in Rem'r for the Arrears in the Life of Ten't *L.* for he claims not under him; but, if a Rent Charge be granted to *A.* for the Life of *B.* and then the Land be lett to *C.* for Life, Rem'r to *D.* the Rent is behind, *B.* dies, and after *C.* dies, *A.* may distrain *D.* for all the Arrears, in Respect of the different Penning of the Act in those two Cases, for the Statute expressly says, that Ten't pur autre Vie of Rent, his Executors, &c. shall distrain for the Arrears, in such Manner as he might have done, if cestuyque Vie had been alive.

The said Act extends to all Rent, whether it be reserv'd in Money or Corn, &c. and whether it be payable every Year, or every 2 or 3 Years, &c. but it extends not to corporal Services, nor to a *Nomine Penae*, (but for this he and his Executors may have Debt;) nor to Relief, (but for this the Lord may distrain, and the Executors may have Debt.)

The Husband of one feis'd of Rent in Fee, &c. shall after the Wife's Death have the said double Remedy for the Arrears incurr'd before and after Marriage; but at Law he could only have Debt for those that incurr'd during the Coverture.

Of Parceners.

163.

PARCENERS are where a Man feis'd in Fee or *T.* has Issue only Daughters, or dies without Issue and leaves Sisters, &c. and the Tenements descend to such Daughters

or

or Sisters, &c. and they enter. They are called Parceners, because they are compellable by Writ *de Partitione faciendâ*, to make Partition; and all of 'em are but one Heir to their Ancestor, and yet they have Moieties, &c. in the Land descended.

If a Man have two Daughters, and one of 'em be attainted, the Moiety of his Lands shall descend to the other; but it is said, that if a Lease *L.* be made, Rem'r to the right Heirs of *A.* being dead, and leaving Issue two Daughters, whereof one is attainted, the Rem'r is wholly void; *for none can purchase by the Name of Heir that is not completely Heir.* Donor reserves two Shillings Rent during his Life, and if he die, his Heir being within Age, then 20 s. to his Heirs; he dies leaving one Daughter within Age, and another of full Age, the Donee shall hold by Fealty only.

164

In a real Action brought against Parceners, if one of 'em be within Age, she shall have her Age, and for the Nonage of one the Parol shall demur against both.

Land is given in *T.* Male, on Condition, that if the Donee die without Heir Female, the Donor shall re-enter; this is a void Condition, because it is repugnant to the Estate.

The Freehold of Parceners, whilst undivided, is entire as to a Stranger's *Præcipe*, and so it remains after the Death of any of 'em, but between themselves it is several as to many Purposes, for one may infeoff the other. The Issues of Daughters shall join in a *Præcipe*, when the common Ancestor, from

from whom they both must claim as Heirs, was last actually seised, but where the Daughters were seised and disseised, their Issues shall not join, because they severally claim as Heirs to their Mothers, yet when they have recovered, they are Parceners as their Mothers were, and shall join in Assise if disseised; and one *Præcipe* lies against 'em, and one of them may release to the other.

By the Statute of *Gloc. 6.* If a Man die having many Heirs, whereof one is Son or Daughter, &c. and the others in a more remote Degree, they shall join in a *Mortancestor*.

There is a Descent *in Capita*, and in *Stirpes*, the First is to the Daughters themselves, the Second to their Issues, the Daughters take equally, the Issues as much as their respective Mothers would have taken.

A Rent Charge may be divided between Parceners, even before they have had actual Seisin of it, but Estovers appendant to a House, a Corody, Common of Pasture or Pischary uncertain, a Villein, Mill, or (a) Castle us'd for Defence of the Realm, &c. can't be divided, but the Eldest shall have them, and make Allowance for the Value in some other Inheritance, but if the Ancestor left no other Inheritance, then one shall have them one Year, and the other the next, or some such Way.

M. bargains and sells a Manor to *B.* by Indenture with this Clause, provided always, and the said *B.* covenants and grants to and with the said *M.* his Heirs, and Assigns,

(a) Vid. sup.
45.

Assigns, that they may dig for Ore and Turf, for the making of Allom in the Wastes, being Parcel of the Manor, by this *M.* has an Inheritance in this Power, and *B.* and his Heirs and Assigns may likewise dig. And *M.* may assign his Interest to one or more working with a Joint Stock, but he can't assign it in Part, or any Way divide it.

If an Earl leave only Daughters, his Possessions shall be divided, and *K.* may give the Dignity to which of them he pleases, but if he leave but one Daughter, the Dignity descends to her, and her Posterity. If one hold by an Office of Honour, as of High Constable, the eldest Daughter shall before Marriage execute it by Deputy, after by her Husband.

Warranty annex'd to Parceners Lands remains after Partition, so does *Warranty annex'd to the Lands of Jointenants if they make Partition by Force of the Statute;* Vid. 31 H. 8. 1. but if Jointenants make Partition at *Common Law*, it is destroy'd. If one seisd of a Manor have by Prescription a Privilege of keeping a Woodward in Woods, Parcel of the Manor within a Forest, and of having the Bark of all Trees fell'd by the Forester within such Woods, and make a Feoffment of the Manor to two, and they make Partition thereof, yet the said Privilege remains.

Partitions between Parceners are either exprefs, or implied: Of exprefs Partitions, there are four by Consent, and one by Compulsion.

The 1st Partition by Consent, is when they agree to divide the Lands into equal Parts in Severalty, and that one shall have such a Part, and another such a Part, &c.

166. The 2d is when they agree that some Friends shall divide the Lands into equal Parts, and then the Eldest shall chuse first one of the Parts so divided, &c. unless they otherwise agree. The Part chosen by the Eldest is called *Enitia Pars*; but this Privilege is Personal to the Eldest, being given to her out of Respect to her Age, and descends not to her Issue, for if she die, the next Eldest shall chuse first.

But if they have an Advowson, the Law gives the first Presentation to the Eldest if they can't agree, and this Privilege goes to her Issue, Assignee, or Ten't by Curtesy.

The 3d Partition is when the Eldest divides, and in such Case she shall not chuse.

The 4th is when after the Land is divided they cast Lots for their Shares.

167. The exprefs compulsory Partition is by Writ de *Partitione Faciendâ*, the Words of which are———*Cum eadem A. & B. in simul & pro indiviso Teneant tres Acres Terræ, &c.* Note, That the Word *Tenet* in a Writ always implies a Ten't of the Freehold; therefore, if one of them be disseis'd by the other, no Writ of Partition lies, and if one of them make a Lease L. the other shall not have a Writ of Partition against her, (a) but against her Lessee she shall; and if one make a Lease T. yet the other

(a) Co. L.

175.

Vid. supra,
69.

other may have a Writ of Partition against her.

There are also several implied Partitions in Law, as if there be three Parceners of a Mesnalty, and one of them purchase the Tenancy, this is a Partition in Law, and extinguishes the Mesnalty for a 3d Part, and the Lord must make several Avowries. And if one Parcener infeoff a Stranger of her Part, the other Parcener and the Feoffee are Ten'ts in Common. And if both of 'em marry, and have Issue, and die, leaving Husbands Ten'ts by Curtesy, the Parcenary is divided, and several *Præcipes* lie against the Ten'ts by Curtesy, &c. But if one recover against the other in Assise, or *nuper Obiit*, yet they remain Parceners, for as the Plaint was for a Moiety, the Judgment and Execution must be pursuant threunto.

In a Writ of Partition, the first Judgment is, *quod Partitio fiat inter Partes prædictas*; and thereupon a Writ is awarded to the Sheriff, that he in proper Person shall go to the Tenements, and by the Oath of 12 lawful Men of the Neighbourhood, in the Presence of the Parties, shall make Partition between them, and allot one Part to the one Plaintiff, &c. making no Mention of the Eldest more than of the Youngest; and when the Partition so made is return'd under the Seals of the Sheriff and Jurors, Judgment shall be, *quod Partitio prædicta Firma & Stabilis in Perpetuum Teneatur*; and this is the principal Judgment, and no Writ of Error lies for the other before this is given.

Parti.

169.
Vid. sup. 6

Partition between Parceners might *at Law* be by Parol, and Rent, or Estovers, which lie in Grant, might be reserv'd or granted, without Deed, for Equality of Partition out of the Land descended, but not out of other Land, and Rent so reserv'd, or granted, is distrainable of Common Right, tho' it be not Rent Service. *But 2. If Parol Petitions be not restrain'd by 29 Ca. 2. 3.* If one Parcener grant a Rent to the other *pro Residuo Terræ*, and do not grant it out of any Land in certain, yet it shall be intended to be out of her Purparty.

A Rent granted to Parceners for Equality of Partition, or reserv'd by them on a Feoffment made by them of the Land which they had in Parcenary, shall descend, &c. in Course of Parcenary, tho' it were granted or reserv'd in joint Words.

Jointenants or Ten'ts in Common could never make Partition by Parol, but by Deed they might; and Ten'ts in Common might have executed a Parol Partition by Livery.

170.

A Partition made of Lands in Fee by Parceners of full Age binds them for ever, whether it be equal or unequal, so does an equal Partition of Lands in Tail, but if it be unequal, it concludes them only during their Lives to defeat it, but the Issue of her that has the lesser Part may after her Death disagree, and enter, and occupy in Common the Part allotted to her Aunt. Ten't in special Tail has Issue a Daughter, his Wife dies, and he has Issue another Daughter by a second Wife, and dies, the Daughters make Partition, the Eldest is, in Respect

spect of the Privy of their Persons, concluded to impeach it during her Life ; but a Partition between mere Strangers is void. A. leaves two Daughters Bastard Eigne, & *Mulier Puisne*, they enter and make Partition, the *Mulier* and her Heirs are concluded for ever.

Co. L. 244

An equal Partition made by the Parceners, and their Husbands shall never be avoided, tho' afterwards it happen to become unequal, by overflowing of Water, ill Husbandry, &c. and a Rent granted by Husband and Wife for Owelty of such Partition, shall charge the Land for ever. But the Wife must be a Party to such Partition. If it be unequal at the Time when it is made, it shall bind the Husbands while they live, but the Parcener which hath the lesser Part, may after her Husband's Death enter into her Sister's Part, and defeat the Partition, not only for so much as will make her Share equal with her Sister's, but for the Whole ; but if she enter into, and agree to the unequal Part, she is bound for ever.

Co. L. 169.

A Partition made by Force of K.'s Writ, between Parceners of full Age, or Infants, or *Femes Covert*, whether equal or unequal, shall never be avoided. A Partition equally made in *Chancery* between Parceners, who were K.'s Wards, at the full Age of the Eldest, bound them for ever, (if Part of the *Capite* Lands were allotted to each of them ;) but if it were unequal, it might be avoided by *Scire Facias* out of *Chancery*, or by a Writ of *Partitio Facienda*, for no Judgment was given on such Partition.

171.

A Par-

Co. L. 166. A Partition made by one of *Nⁿ sane* Memory binds herself, but not her Issue, unless it be equal. And an equal Partition made by one under Age shall never be avoided; if it be unequal, it may be avoided by her, either during her Nonage, or after her full Age, but if she take the whole Profits of the unequal Part after her full Age, she is bound for ever.

172. The full Age of Male or Female in common Speech is understood of the Age of 21 Years, for before that Age one can't bind himself by any Deed, nor alien Land or Goods; but he may bind himself *in a single Bill*, to pay for necessary Meat, Drink, Apparel, Physick, good Teaching, &c. but a Bond with a Penalty for the Payment of such Debt is not good. If he present not to a void Church, it shall lapse after six Months. If he be an Executor, he may release on Payment, not without; and generally what the Law binds him to do is good, if done by him voluntarily without Suit of Law.

1 Lev. 86.

One under Age can't be a Bailiff or Receiver, nor charged in Account as such. A Bailiff is a Servant who has the Administration of Lands for the Owner's Benefit, and he is chargeable in Account for the Profits he has raised, or reasonably might have done, his Expences deducted. An Account against a Receiver, is when one receives Money for another's Use to render an Account, but she shall not be allowed his Expences, for this Cause a Bailiff shall not be charged as Receiver, for then he should be

his Expences. In an Account against a Bailiff, the Plaintiff need not shew by whose Hands he receiv'd the Money, as in an Account against a Receiver he must, except he be a Merchant, and bring an Account against another Trading with him with a Joint Stock to their common Profit, in which Case naming himself a Merchant he may have an Account against the other naming him a Merchant, and shall charge him as *Receptor Denariorum ipsius B. ex quacunque Causa & Contractu ad communem Utilitatem ipsorum A. & B. Provenientium*, and the other shall account for what he might have receiv'd, and be allowed his Expences. One Jointenant making the other Bailiff of his Moiety shall have an Account against him. A Man can't be charged in an Account but as Guardian in Socage, Bailiff, or Receiver.

Minor jurare non potest, therefore he can't be a Juror, nor wage his Law, and if he make Default in a *Præcipe quod reddat*, in which Case one of full Age may wage his Law of *Non Summons*, he shall not be prejudiced by it, because the Mean to excuse the Default is taken away by Law.

Parceners of two Parcels of Land, one in Fee, the other in *T.* make Partition, by which the Land in Fee is allotted to the one, that entail'd to the other; this shall never be avoided by the Issue of her to whom the Land in *T.* was allotted, nor by the Issue of the other, if it were equal, and the Land in Fee descend, or the

Rev'n

173.

Rev'n thereof expectant on a State *L.* or *T.* but if she that has the Fee alien in Fee, or *T.* and have Issue and die, the Issue may avoid the Partition, and enter on the Land entail'd and hold in Purparty with her Aunt, for the Partition is no Discontinuance, nor can the Tail be barr'd without full Recompence, and it was the Folly of the other Parcener to take the Land *T.* only, for she might have challeng'd a Moiety of the other. So when a Woman that has Title of Dower out of three Manors, takes one for her Dower, it is said, she shall hold it charged with her Husband's Incumbrances, for she might have had a 3d of all Three, and have holden the same discharg'd.

174.

A. leaves two Daughters, and two Acres, in one of which he has a good Title, in the other a bad one, one takes the one, the other the other, and after an Estate of Freehold is evicted from the Parcener that had the Acre with the bad Title, either as to the Whole, or Part of her Purparty, she may enter and avoid the Partition as to the Whole. But if she alien her Part in Fee before the Land is recovered, she can't enter into the other Acre, for an Alienation in Fee dissolves the Privy, but a Lease *L.* or *T.* or Gift in *T.* does not. *And tho' in the Case above the Rev'n expectant on a State in T. made by the Parcener which had the Fee, be of so small Consideration in Law, that it shall not be esteem'd a Recompence sufficient to bar the Entry of the Issue into the Lands in T. allotted to the other Parcener, yet in this Case a Rev'n on a State T.*

indef

inasmuch as it continues the Privity of the Coparcenary, shall give the Parcener or her Issue all the Privileges incident thereto.

When a Parcener having made Partition, or one that has made an Exchange, enter by Force of the Condition implied by Law on every Partition and Exchange, for the Eviction of any Part of what was allotted to them, they thereby avoid the whole Partition or Exchange. Yet if a Parcener be impleaded, and vouch the other by Force of the Warranty implied in Law, she shall recover but *pro Ratâ*, for that will make her Part equal with her Sister's. But where a Man vouches another by Force of the Warranty implied by Law on an Exchange, he shall recover a full Recompence for the Lands recover'd against him, for it shall be intended that on the Exchange he gave to the other Lands to the full Value of them.

Notwithstanding a Parcener that makes a Feoffment of her Part, doth thereby wholly dismiss herself from having any Part of the Land as Parcener; yet if her Feoffee be impleaded and vouch her, she may have Aid of the other to deraign the Warranty Paramount, but not to recover *pro Rata*. And if a Parcener infeoff her Son and Heir Apparent, and die, the Son may vouch the other Parcener to deraign the Warranty Paramount, tho' he come to the Land by Feoffment, because the Warranty betwixt him and his Mother was extinct by Act of Law. A. feis'd of Land in Fee has Issue two Daughters, and makes a Gift in T. to one
of

2 H. 6. 16.
Co. L. 39c.
2.

of them, and dies seisd of the Rev'n, and the Donee is impleaded, she shall not have Aid of her Sister to recover *pro Rata*, or to deraign the Warranty Paramount, for her Sister is a Stranger to her Estate Tail. *But in this Case she may vouch herself and her Sister, if her Estate were made to her with Warranty.*

175.

None but Parceners could at Law have the Writ *de Partitione Facienda*, but the Parcener might have it against her Sister's Alience, or Husband being Ten't by Curtesy, *non è Converso*. If there be three Sisters, and the Eldest purchase the Part of the Youngest, she shall have the said Writ against the middle Sister; and if the Husband of the Eldest purchase the Part of the Youngest, he and his Wife may have it against the middle Sister. By 31 H. 8. 1. & 32 H. 8. 32. all Jointenants and Ten'ts in Common may have the said Writ, and Ten't by Curtesy by Equity of them, but a Parcener and her Sister's Feoffee shall not join in such Writ, for one has a Remedy by Statute only, the other only at Law.

Of Parceners by Custom.

Parceners by Custom, are the Sons of one seisd in Fee or T. of Land of the Nature of Gavelkind, which shall equally inherit, in Respect of the Custom of the Fee, not in Respect of their Persons, for they are not one Heir, as Daughters are; and the Writ *de Partitione Facienda* lies between them; but the Declaration must mention

the Custom, as to say, that the Land is of the Custom of Gavelkind; and Gavelkind and *Burgh English* differ in this Respect from all other Customs, that the Law takes Notice of them when generally alledged.

There is a Partition of a different Nature from any of those afore-mention'd; as if one seis'd of Land in Fee have Issue two Daughters, and give Part thereof to one of them and her Husband in Frankmarriage, and the seis'd of the Remnant being of greater Value than that given in Frankmarriage, in this Case the Remnant shall descend to the other Sister only, and she shall occupy it to her own Use, unless the Donees will put the Land given in Frankmarriage in Hotchpot, *i. e.* together with the said Remnant, and if they offer to do it, and the Parcener refuse to put the Land in Fee in Hotchpot with the Land given in Frankmarriage, the Donees can have no Writ of Partition, because they do not hold *in simul*, but they may enter into the Land in Fee, and hold in Parcenary with her; when the Lands are put in Hotchpot, and the Value of each Acre known, Partition shall be made in this Manner, *viz.* the Donees shall retain the Land given in Frankmarriage, and shall have so much of that in Fee descended, as will, together with the Land given in Frankmarriage, make their Share equal to that of the other Parcener. And after such Partition, the Land given in Frankmarriage shall be as the other Land descended, and if the Donees be impleaded thereof, they shall have Aid of the other Parcener: In like

176.

177.

like Manner, a Parcener that has Rent granted to her for Owelty of Partition, shall have the same in Course of Descent.

Co. L. 176. The Writ *de rationabili parte Bonorum*, lies not without a Custom; The Children reasonably advanc'd by the Father in his Life with any Part of his Goods, shall have no further Part therof. In *London*, a Child advanc'd by the Father with any Part of his Goods, shall have no Part of those that he leaves at his Death, unless the Father declare by Will, or under his Hand, that it was but in Part of Advancement, and then such Part shall be put in Hotchpot with the rest.

178. If the Donees or Parceners die before they have made Partition, &c. their Issues shall have the same Benefit of putting in Hotchpot.

The Cause why Land so given shall be put in Hotchpot is, for that such Gift by the Word Frankmarriage implies an Advancement of the Donee, and if she will not put the Land in Hotchpot, it shall be intended that she was sufficiently advanc'd. But if the Father give Lands to his Daughter in Fee or T. &c. such Lands shall never be put in Hotchpot, neither shall Lands which descend from any other Ancestor than the Donor in Frankmarriage be put in Hotchpot.

179. If the Land given in Frankmarriage be of equal Value with that descended, there shall be no such Putting in Hotchpot, for the Donees have an equal Share already. And it seems, that the Donees shall have

the Rev'n of the Land given in Frankmarriage, for otherwise their Share would not be equal. But if the Lands given in Frankmarriage were of equal Value with the rest of the Donor's Land at the Time of the Gift, and afterwards impair'd without any Default in the Donees, or if the Donor after purchase more Land in Fee, and die seisd thereof, the Land given in Frankmarriage shall be put in Hotchpot, &c.

If Donor in Frankmarriage die seisd of Lands in Tail, the same shall not be put in Hotchpot, but only those whereof he dies seisd in Fee.

182.

If there be three Parceners, and the Youngest will have a Partition, and the other two will not, they may allot to her a Part to hold in Severalty, and hold the Remnant in Parcenary; and after either of them two may have the Writ *de Partitione facienda* against the other. But when Partition is made by Force of the Writ, the whole Land must be divided.

Of Jointenants.

Jointenants are where a Feoffment is made to two or more and their Heirs, or a lease is made to them for a Term of their lives, and they enter. And if a Rent be granted to *A. & B. habendum* to *A.* till he be married, and to *B.* till promoted, &c. in this Case they are Jointenants, tho' the limitations be several, and the Rent shall survive by the Death of either of them, if

N

his

his Moiety were not determin'd before his Death by Marriage, &c.

An Alien and a Subject may purchase Lands jointly, & *nullum Tempus occurrit Regi* on Office found.

If two or more disseise another of Land, &c. to their own Use, they are Jointenants; if to the Use of one of them, he to whose Use, &c. is sole Ten't, and the others Coadjutors; if it be to the Use of one that is absent, and knows not of it, they are Jointenants before he agrees, but after he agrees, they cease to be Ten'ts, and are only Coadjutors, and the other by agreeing to such Dis's'in to his Use becomes Ten't, and is as much a Dis's'or as if he had commanded it, for *omnis Ratihabitus Retrotrahitur, & Mandato Æquiparatur*; But an Assise lies as well against the Coadjutors, as the Dis's'or, who is the Ten't, and if the Ten't die, it lies against the Coadjutors, and the Ten't of the Land, tho' he be not Dis's'or. If the Demandant in a *Præcipe* disseise the Ten't to another's Use, he shall not abate the Writ thereby, because tho' he be a Dis's'or, he gains no Estate in the Land. Lessee *L.* is disseis'd to the Use of the Lessor, and the Lessor afterwards agrees, yet he is Dis's'or in Fee, for by the Dis's'in the Fee was devested; and the aforesaid Rule, that a subsequent Agreement shall be equivalent to a Command precedent, shall not have such a Retrospect, for the Benefit of him that agrees to such wrongful Estate, as to revest his Rev'n, which was devested before.

Dis's'in

Dis's'in of Land, &c. is when one enters that has no Right of Entry, and ousts the Ten't; but an Entry alone is not a Dis's'in without a Claimer, or taking of the Profits.

181.

If one Jointenant die, his whole Interest shall survive to the others. But the Estate of a Parcener, or Ten't in Common, shall descend to their Issue, &c. Land is lett to *A.* and *B.* for *A.*'s Life, *B.*'s Interest shall survive, but *A.*'s cannot. A naked Trust or Authority can't survive, but a Trust coupled with an Interest shall survive together with it. If a Letter of Attorney be made to 4 or 3, to deliver Seisin jointly or severally, two of them can't do it, for it is either jointly by them all nor severally by any of them. But where the Sheriff takes a Warrant to 4 or 3 on a *Capias* jointly or severally to arrest one, two of them may arrest the Party, for the greater Expedition of Justice; and for the same Reason, a *Venire Facias* be awarded to 4 Coroners shall return a Jury, and one of them die, the rest may execute it.

Vid. supra;
169.

Joint Interests in Chattels, Goods, Debts, Covenants and Contracts, shall go to the survivor; but if two Merchants trade with joint-Stock, and one of them die, his share shall go to his Executors.

182.

If Land be given to two Men, or to two Men, or to two Men and one Woman, or to a (*a*) Man and his Mother, and the heirs of their Bodies begotten, in all these cases the Donees have a Joint Estate for ever, and several Inheritances, inasmuch as

(a) Vid. Co
L. 184. a.

183.

they can't have one Heir begotten between them, *and the Survivorship of the Inheritance can't hold Place where Land is given to two Men, and the Heirs of their Bodies, without defeating the Will of the Donor as to the Issue of him that first dies, for whose Benefit the Gift was made as well as the Donees: But where Land is given to two Men and their Heirs, the Survivor shall have the Whole, because in such Case the Limitation to the Heirs is wholly for the Fee's Benefit, and means only that the absolute Property shall be transferr'd to him.* As to the Inheritances in the Case above are several, so the Rev'n depending thereon is several also, and if any of the Donees die without Issue, the Donor shall, after the Death of all the Donees, enter into a Moiety, or 3d Part, &c. If the Donor grant over his Rev'n to two, the Grantees are Jointenants of the Rev'n of each Estate T. And if the Lease be for L. Rem'r in T. Rem'r in Fee, and two, they are Jointenants for L. Ten'ts in Common of the Estate T. Jointenants of Fee.

184.

If a Lease be made to two, and to the Heirs of one them, they are Jointenants for L. and one has a Freehold, the other has a Fee; and if he that has the Fee die, his Heir shall have the Fee, and the other shall have the Freehold; then the other, and a Stranger enter, the Heir of him that had the Fee may either have Mortd'ce, or a Writ of Right, both of which he supposes the Fee to have been executed, or he may bring a Writ of Intrusion and term it a Rem'r, or if the Conveyance were by Fine, he may bring a

Scire Facias, which proves the Fee not to be executed, so that it is in his Choice to take it either Way. The Cause why the Inheritances in the Cases aforesaid drown not the States for *L.* is for that they are all made by one Conveyance, *and by the express Purport of the Deed* a Joint Estate is given to the Parties for their Lives; but the Inheritance is divided from the Estate *L.* only in Supposition of Law to this Purpose, for the Party can't convey it away after his Decease, *and retain his Joint Estate for L.* and where the Inheritance and the particular Estate are divided in several Conveyances, the one drowns the other, therefore if lessor *L.* C. L. 182.
b. grant the Rev'n to his two Joint Lessees and the Heirs of their two Bodies, they become Ten'ts in *T.* in Possession: And if such Lessor grant his Rev'n in Fee to one of his Lessees, or if one make a Lease *L.* and grant the Rev'n in Fee to his Lessee and a Stranger, or if Lessee *L.* grant his Estate to his Lessor, and a Stranger, or to one of his Lessor's Joint Grantees of the Rev'n in Fee; in all these Cases the Fee is executed for a Moiety in him in whom the Fee and Estate *L.* meet together, and as to the other Moiey there is an Estate *L.* in the one, and the Rev'n of the Fee in the other, and no Joint Estate remains.

The *Habend'* may sever the Premisses, as C. L. 183. when Land is lett to two, *habend'* to one b. or *L.* Rem'r to the other for *L.*

If one Jointenant grant a Rent, or Com- C. L. 184. mon, or Corody, or such-like, out of his b. part, or a Way over the Land, and die, the

Survivor shall hold the Land discharg'd; and if he suffer Judgment in an Action of Debt, or acknowledge a Recognizance, and die before Execution, there can be no Execution after his Death, for the Rule is *Jus accrescendi præfertur oneribus*.

So if the Husband grant a Rent out of a Term for *T.* which he has in his Wife's Right, and die, she shall avoid it; and the Lord entring on Land purchas'd by his Vilein, shall avoid a Recognizance acknowledged by him, and not executed, but he shall not avoid a Lease *T.* made by him.

Co. L. 186 But if a Jointenant make a Lease *T.* in *Præsentior Futuro*, of the Land, or the Herbage, and die, it can't be avoided by the Survivor, because the Lessee has an Interest in the Land it self vested in him, and a Right to enjoy the Possession thereof by Force of the Lease. But if a Jointenant make a Lease to commence on a Condition precedent, and die before it be perform'd, the Survivor is not bound by it; and it is said, that if a Jointenant be indebted to *K.* and die, the Land cannot be extended in the Hands of the Survivor. If a Jointenant take a Lease of his Moiety, the Survivor shall not be estopp'd by it, but he shall be bound by a Recovery had against the other, because the Right is bound by it. The Reason of all these Cases is, because the Survivor claims not from his Companion, but from the Feoffor, and may plead the Feoffment to himself without mentioning the other; and if a Jointenant make a Lease *T.* of his Moiety, reserving a Rent, and die

Q. Dy. 224.
Pl. 32. Pl.
C. 261. a.
263. b.

it shall go to his Executors, not to the Survivor, because he claims above it.

If a Jointenant grant a Rent, and then release to his Companion, the Grant remains good, because the Releasee claims not by Survivor, and yet in Judgment of Law he is in from the first Feoffor to most Purposes, and the Estate of him that released is drown'd; so if Lessee grant a Rent Charge and surrender to his Lessor, yet his Grant remains good; but there is no Question where there are three Jointenants, and one of them grants a Rent Charge, and then releases to one of his Companions only, but that the Charge remains good, because the Releasee claims not from the Feoffor, but only from the Releasor.

A Devise of Land whereof the Devisor is jointly seis'd, or possess'd, is void, for the Title of the Survivor is Paramount that of the Devisee, tho' they meet in an Instant. In like manner a Devise of a Heirloom, Heriot, or Mortuary, is void.

Two Females are joint Lessees. If one of them takes Husband and dies, the Survivor, not the Husband, shall have the Whole, for the Survivor has the elder Title.

Jointenants are seised *per My & per Tout*, i. e. each of them is seised by every Parcel, and in every Parcel, and in the Whole jointly with his Companion; but each of them has a Right but to a Meity, &c. as to infeoff, demise, give, forfeit, or lose by Default. If two Jointenants join in a Feoffment, a Re-entry by Force of a Condition can be reserv'd to one of 'em into no more

186.

than a Moiety, because in Judgment of Law but a Moiety pass'd from him; And in such Case, if one of 'em die, the Feoffee can't plead a Feoffment of the Whole from the Survivor: But each of 'em may warrant the Whole, for a Man may warrant more than pass'es from him. If one of them make an Indenture of Bargain and Sale, and the other die before Inrollment, a Moiety only shall pass. If a Villein or an Alien purchase Lands jointly with another, the Lord or *K.* shall enter but into a Moiety.

One Jointenant may make the other Bailiff or Lessee *T.* or *W.* of his Moiety.

If two Jointenants be of an Advowson, and one present a Clerk who is Instituted, and die, this shall serve for a Title in a *Quare Impedit* by the other. If one Jointenant or Ten't in Common present alone, or if they both severally present, the Ordinary may admit or refuse the Presentee of either of 'em, and if they don't agree within the 6 Months, the Church will lapse. Tho' the eldest Parcener may present alone if they don't agree, yet if there be four Co-parceners, and the Eldest and Youngest present, the Ordinary may refuse their Clerk, because the Eldest waives her Privilege by joining with the Youngest.

187. Jointenants of a State of Freehold could never make Partition by Parol, *either before or since* 29 Ca. 2. 3. but it is said that Jointenants for Years might: and a voluntary Partition by Deed made between them remains as it was at Common Law, therefore tho' a compulsory Partition by Force of

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31 *H. 8. 1. &c.* saves the Warranty by the express Words of the Statute, yet such voluntary Partition destroys it.

If an Estate be made to Husband and Wife, and a 3d Person and their Heirs, he takes one Moiety, and Husband and Wife another, for they are but one Person in Law; therefore there are no Moieties in Law of a Joint Estate made to them both during the Coverture. For this Cause, if the Husband be attainted and executed, the Wife shall by her Petition regain all such Lands conveyed jointly to her and her Husband; so if the Lord enter on the Husband being his Villein, and having made such Purchase, the Wife surviving shall recover the Whole. It is said, that if a Deed of Feoffment, or grant of a Rev'n, be made to 'em, whilst they are sole, and then they intermarry before Livery, or Attornment, that they take no Moieties; but if they had been seised of an Use by Moieties before 27 *H. 8. 10.* and such Use had been executed by the Statute, they should have had the Estate of the Land by Moieties, for they should have the Estate in such Plight as they had the Use. If they vouch and recover by Force of a Warranty made to 'em when sole, yet they shall have no Moieties in the Estate recovered. A Lease is made to *B.* and to Husband and Wife, viz. to *B.* for *L.* Husband in *T.* Wife for Years, in this Case each of the Three has a several Estate.

Right of Entry or Action in one cannot stand in Jointure with a Freehold or Inheritance in Possession in another, but Right of

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Entry may stand in Jointure with a Right of Action, for the Parties may join in a Writ of Right: A Rent suspended by Unity of Possession, can't stand in Jointure with a Rent in Possession, nor a Freehold with a Lease *T.* nor a Freehold and Inheritance in Possession with a Rev'n expectant on a Freehold, nor a Seisin in a natural Capacity with a Seisin in a Politick Capacity.

Two Jointenants, the one for *L.* the other in Fee lose by Default, one shall have a Writ of Right, and the other a *quod ei Desorreat*, yet after Recovery they are Jointenants again.

Joint Estates must vest at once, therefore if a Lease *L.* be made, Rem'r to the Heirs of *J. S.* and *J. N.* then living, the Heirs can't be Jointenants; but if *A.* make a Feoffment to the Use of himself and such Wife as he shall marry, and afterwards take a Wife, he and his Wife are Jointenants, *tho' he were seisd of a qualify'd Fee before the Marriage and the Wife had nothing, for by the Marriage the contingent Estate vested in them both at the same Time by the said Limitation.* So if a Disseisin be to the Use of two, tho' they severally agree, they are Jointenants, for an Agreement subsequent is equivalent to a Command precedent.

Where Jointenants or Parceners pursue one Remedy, and one is summon'd and seised, and the other recovers, he that was summon'd and seised shall enter with him; but where the Remedies are several, the one shall not enter with the other till both have recover'd.

Of Ten'ts in Common.

TEN'ts in Common are those that come to the Land by several Titles, or by one Title and several Rights, and they have the Possession in Common, but several Estates. As if there be three Jointenants, and one alien his Part, the other two are Jointenants of their Parts that remain, and hold them in Common with the Alience. And if Jointenants make several Feoffments or Gifts in *T.* or Leases *L.* the Feoffees, Donees, or Lessees, are Ten'ts in Common.

189.

If Land be given to two Bishops, or Abbots, or Parsons, and their Successors, they are Ten'ts in Common at first, and have no joint Estate for *L.* for they take in their Politick Capacities in Right of their Churches, or Houses; so if Land be given to the King, and a Subject and their Heirs, or if the Crown descend to a Jointenant, or if Lands be given to a Layman and a Parson, and to the Heirs of one, and Successors of the other, they are Ten'ts in Common, for the Fee vests in them in several Capacities. So if Land be given to *F.* Bishop of *N.* and his Successors, and to *F. O.* Dr. of Divinity and his Heirs, he, being the same Person is Ten't in Common with himself. But if a Lease *T.* be granted to a Layman and Bishop, they are not Ten'ts in Common but Jointenants, for they both take it in their natural Capacities.

190.

191

A Co-

A Corody granted to two and their Heirs is several, for the Corody is uncertain and Personal.

If Land be given to two, *Habend.* the one Moiety to one and his Heirs, and the other Moiety to the other and his Heirs, they are Ten'ts in Common; so if a Man feis'd in Fee, infeoff another of a Moiety, or ad or 4th Part without any Assignment of it in Severalty, the Feoffee and Feoffor are Ten'ts in Common. If a Verdict find that one has *duas Partes Manerii in tres Partes Divis'*, it shall not be intended to be in Common, as it would have been if the Words were *in tres Partes Dividend'*. A feifed of a Manor to which an Advowson is appendant, makes a Feoffment of three Acres, Parcel of it to two, *habend'* the one Moiety with the Moiety of the Advowson to one, and the other Moiety with a Moiety of the Advowson to the other; this disannexes the Advowson from the Manor, and annexes it to the three Acres. At Law, such Feoffment of an uncertain Part with Livery was good without Deed, but an Advowson could never be disannexed from a Manor, and annex'd to Part of it without Deed.

391.

If there be two joint Lessees *L.* and one grant all that belongs to him to another, the Grantee and the other Lessee are Ten'ts in Common as long as both Lessees are alive, and the Lessor shall enter into a Moiety by the Death of either of them, because by such Grant the Jointure was severed.

severed: And it makes no Difference in this Case, if the joint Lease were made by these words, *habend'* to them two for their Lives, and to the Survivor, for *expressio eorum quæ tacite insunt nihil operatur*.

If there be two Parceners in Fee, and one of them make a Lease *L.* this severs not the Parcenary nor the Lord's Avowry; yet if one Jointenant make such Lease, he thereby severs the Lord's Avowry, [*sed Q. for the Rev'n in the Lessor, and the Freehold and Inheritance of the other, are holden of the Lord as they were before:*] And a Jointenant, by making such Lease, severs the Jointure for 3 Reasons.

192.

Perk. 653.

1. The Freehold is thereby sever'd from the Jointure, and consequently the Rev'n depending on the Freehold is sever'd also.

And if there be two Jointenants for *X.* and one of them lease his Part for *X.* the Jointure is sever'd, for the Lease *X.* in Possession in the one, can't stand in Jointure with the Rev'n in the other Expectant on a Lease *X.*

2. If such Lessee of one Jointenant be impleaded and make Default, his Lessor shall alone be receiv'd.

3. If a Rent were reserved on such Lease the Lessor alone shall have it, but if two Jointenants join in a Lease *L.* reserving a Rent to one of them, both shall have it in respect of their joint Rev'n, unless the Reservation be by Indenture; and if they reserve the Rev'n by Deed Poll or Indenture to one of them only, both shall have it, because

because the Reservation of the Rev'n is void, for they had the Rev'n before.

If the Lessee of two Jointenants surrender to one of them, it shall enure to them both *for such Conveyance is void, if made to any but him in Rev'n or Rem'r, and wholly operates by drowning the particular Estate in the Rev'n &c.* But if such Lessee grant his Estate to one of them, the other shall have no Advantage thereof. If two Jointenants make a Lease *L. Rem'r* to one of them in Fee, this is a good Grant of the Rem'r from one to the other.

193. After the Jointure has been sever'd by the Lease of one Jointenant, if the Lessee die in the Life of both Jointenants, they become Jointenants again; but if either of them die before the Lessee; and his Part descend to his Issue, &c. the Jointure is gone for ever.

If one Jointenant make a Lease for his own *L.* and die, there shall be no Survivor, tho' the Lease that sever'd the Jointure be determin'd by his Death. 1. Because at the Time of his Death the Jointure was sever'd. 2. Because, *Regularly* there must be equal Benefit on both Sides, but in this Case it is clear, That if the other Jointenant had died there could have been no Survivor.

Vid. Co L.
181. b.

A Release by a Jointenant to one of his Companions only enures by Way of *Mortgage* the Estate, and if a Joint Estate be made to Husband and Wife, and a 3d Person and he release to the Husband only, the Husband alone hath his Moiety, and if he release to the Wife, she hath the whole. *Mortgage*

Vid. supra.
273.

Moiety of the 3d Person, and the Husband hath nothing therein but in her Right. But a Release by a Jointenant to all his Companions enures not by Way of *Mitter le Estate*, as to most Purposes, for they to whom the Release is made are suppos'd to be in from the first Feoffor, and shall deraign the Warranty Paramount.

Some Releases enure by Way of *Mitter le Droit*, as a Release by a Dis'see to one of his Dis'sors, which by the Delivery of the Deed vests the whole Inheritance in the Releasee, and divests the Estate of the other, because he came to it merely by Wrong. But if there be two Usurpers, a Release by the rightful Patron to one of them enures to both, for they come not in merely by Wrong, but by the Admission and Institution of the Bishop, which are judicial Acts.

And some Releases enure by Way of Extinguishment, as if a Dis'sor make a Feoffment to two, or a Lease *L. Rem'r in Fee*, and the Dis'see release to one of the Feoffees, or to the Lessee *L.*

A Rent may be reserv'd on Releases that enure by Way of *Mitter le Estate*, but not on those that enure by *Mitter le Droit*, or Extinguishment.

Ten'ts in Common may be such by Title of Prescription.

In all Actions real or mix'd, Ten'ts in Common shall sever, because their Titles and Estates are several, but Jointenants shall join, because their Titles and Estates are joint. *A. B. and C. are Jointenants, A. aliens*

194.

195.

aliens to *B.* and then *B.* and *C.* are disseis'd, they shall join in an Affise for the two Parts, and *B.* alone shall have one for the Third. If Parceners being in by divers Descents be disseis'd, they shall join in an Affise, for they are Parceners as their Mothers were, and as one Heir to their common Ancestor.

197.

If two Ten'ts in Common join in a Gift *T.* or Lease *L.* reserving 20 s. or a Pound of Pepper, or any other severable Rent, and be disseis'd they shall not join in an Affise, but each of them shall have one for a Moiey of the Rent, for as the Rev'n is several, the Rent incident thereto is several also. But the Plaint must be, *de Medietate Vingtii Solidorum*, &c. not *de Dimidio*, or 10 s. &c. But if a Thing entire, as a Horse, &c. be reserv'd, they must of Necessity join in an Action for it, for one can't make a Plaint of the Moiey of a Horse. They shall also join in a *Quare Impedit*, and Writ of Right of Ward, and Ravishment of Ward, and if one of them release to the Defendant, the other shall take Benefit thereof and recover the Whole, for such Actions are partly real, and therefore the Release of one shall not bar the other. They shall also join in Detinue of Charters, and if one be Nonsuit, the other shall recover. It is said, that they shall join in *Warrantia Carte*, and sever in Voucher.

If two Ten'ts in Common grant a Rent of 20 s. out of their Land, the Grantee shall

shall have two Rents of 20 s. for their Grants shall be taken most strongly against themselves, and shall enure severally in Respect of their several Interests; but if they reserve 20 s. on a Gift, or Lease made by them both, they shall have but one Rent of 20 s.

Ten'ts in Common shall join in Actions Personal, as Trespass, Account against their Bailiff, &c. and such Actions shall survive; and if they bring a *Quare Impedit*, and six Months pass, and one die, the Writ shall not abate, tho' it be partly real, because, if it should, this Wrong would be remediless.

198.

If three Parceners recover Land and Damages in *Mortancestor*, and one of them die, her Issue shall have Execution not only of the Land, but also of the Damages as accessory to the Land, and yet the Words of the Judgment are joint, viz. to recover Lands and Damages; but if the three Sisters had sued Execution of the Damages by *Elegit*, and one of them had died, the Land taken in Execution would have surviv'd to the other, as a joint *Chat-tel vested in them*. If (a) the Aunt and Niece join for Waste done in the Sister's Life, the Aunt alone shall recover Damages, because they are given in Respect of the Privy which is Personal. If Ten'ts in Common make a Lease T. reserving Rent, they shall join in an Action of Debt for it, for that is grounded on the Contract which is Personal, but sever in Avowry, for the

(a) Vid. supra, 94.

the Distress is made in respect of the Revenue which is in Common.

199.

There may be Ten'ts in Common of Chattels real or personal, entire or several, as Leases *&c.* Wards, Horfes, &c. as when any of those who were Jointenants of them grant over their Interest to a Stranger, the Grantee and the other are Ten'ts in Common.

When a Waife, &c. or Estray, falls to them who have a Manor in Common, or Land escheats to them, they are Ten'ts in Common thereof.

Ten'ts in Common of a Term can't join in *Ejectione Firmæ*, or *quare ejecit infra Terminum*, because these Actions concern the Right which is several. If two be possess'd in Common of a Term for Years of Land, or of any other severable real Chattel, and one eject the other by driving off his Cattle, or not suffering him to occupy, the other shall have Ejectment, and recover Damages against him for the first Entry, but not for the Mean Profits. But if one of them only take the whole Profits, he does not eject the other thereby, nor can the other have Trespass against him, for each of them may occupy the Whole *per My & per Tout*. And if two be possess'd in Common of a Chattel Personal, or an entire real Chattel, and one take it out of the other's Possession, he has no Remedy but to take it again when he sees his Time.

200.

If there be two Ten'ts in Common of a Park or Dove-House, and one of them destroy all the Deer, or take all the old

Doves

Doves and and destroy the Flight; or if two have Land and Meer-stones in Common, and one of them carry them away; or if they have a Folding in Common and one disturb the other to erect Hurdles, in all these, Cases Trespass *quare Vi*, &c. lies.

If two several Owners of Houses have a River in Common, and one of them corrupt it, the other shall have an Action on the Case. If one be willing to repair a House which he holds in common, or jointly with another, he may have a Writ *de Domo Reparanda* against him. But one Jointenant or Ten't in Common could not have an Action of Account against the other before 4 & 5 *Annæ* 16. unless he were his Bailiff. But by that Statute they and their Executors, and Administrators, may have an Account against the others as Bailiffs, for receiving more than their Proportion, and against their Executors and Administrators.

If Land be given to two for Life, and to the Heirs of one of them, and Ten't for Life do Waste, he that hath the Fee can't have an Action of Waste on the Statute of *Gloucester*, but he may have one on *W. 2.* which enacts, That if there be two Ten'ts in Common of a Wood, Turbary, Piscary, &c. and one do Waste, the other shall have a Writ of Waste, and the Waster shall have Election before Judgment either to have his Part in certain assign'd to him by the Oath of 12 Men, (and then the Place wasted shall be assign'd for Part thereof,) or to grant that he will take no more for the

the Future than his Companion shall approve of. This Act by Construction extends to Jointenants, not to Parceners, because they might have the Writ de *Partitione Facienda*.

If one plead a Lease, Gift, or Feoffment of Tenements which lie in Livery, or a Grant of Things which lie in Grant, he shall conclude *virtute cuius fuit inde Seisitus*, but he that pleads a Lease *T. of Land*, shall say *virtute cuius Intravit*, & *fuit inde Possessionatus*, for a Man is not possess'd by Force of such Lease before Entry.

One Jointenant can't infeoff the other, for one has no Freehold distinct from that of the other, but one may release to the other, and by such Release the Whole shall vest in the Releasee, for they both claim by the Joint Words of the same Conveyance; which Words, if they be void as to one at first, or cease to have any Effect as to him by Matter ex Post Facto, are sufficient to vest the Whole in the other. One Ten't in Common may infeoff the other, but can't release to him, for their Estates are as distinct as if they were severally seis'd of several Lands. One Parcener may Release to the other, for they have an entire Fee as they take it as one Heir to the same Ancestor, and one may infeoff the other, because their Estate is Several, as it is severally descendible to their respective Issues.

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Of Estates upon Condition

BY a Condition, as it is generally taken in this Chapter, is understood a Quality annex'd to the Realty by him that has an Estate, Interest or Right therein, whereby an Estate may be defeated, or enlarg'd, or created upon an uncertain Event. Of Conditions some are implied in Law: others are in Deed, *viz.* expressly contained in the Deed by which an Estate is convey'd; as when the Feoffor, Donor, or Lessor, reserves a Rent payable at such Feasts, on Condition that if it be behind at the Day of Payment, or a Week after, &c. that then he shall re-enter into the Whole, or Part; in this Case, if it be not paid at or before the Time, he shall re-enter according to the Purport of the Condition, and defeat the Estate of the Feoffee, &c.

201.

There can be no Re-entry for Non-Payment of Rent without a Demand upon the Land, for the Land is the principal Debtor, and the Rent issues out of it, and in Assise for the Rent, the Land shall be put in view, and an Eviction of the Land evicts the Rent, and the Person of the Feoffee shall not be afterwards charged.

The Demand must be made on the most notorious Part of the Land, as if there be a House, it must be made at the Fore-door thereof; if the Feoffment be of a Wood only, it must be at the Gate or High-way, or other most notorious Place; if two Places are equally notorious it may be made at either of 'em. If Rent be

202.

be reserv'd to *K.* payable at *K.*'s Receipt at *Westminster*, yet if he grant over the Rev'n, the Grantee shall demand it on the Land. If the Rent be demanded at a Place not the most notorius, and in Pleading a Demand be alledged at the House, the Feoffee may traverse the Demand, for it was void. If it be reserv'd payable at a Place from the Land, yet it is Rent, and must be demanded at the Place appointed, observing the said Rules concerning the most notorius Place. The Time of Demand appointed by Law, is such a convenient Time before the Sun-setting of the last Day of Payment that the Money may be numbred and receiv'd, *and yet the Rent is not due till the last Minute of the natural Day, before which Time, if the Feoffor die, his Heir, not his Executor shall have it.* And if the Feoffee tender the Rent to the Feoffor upon any Part of the Land at any Time of the Day, and the Feoffor refuse to receive it, he shall not after take Advantage of any Demand for the Rent on that Day.

The Reason why the Law is so punctual in these Cases, in appointing a certain Time and Place is, That the Feoffee may not lose his Land by being surprized with an unexpected Demand, and the Feoffor may be at a Certainty, either to have the Rent, or his Land again for Default of Payment. But if a Rent be granted payable at a certain Day, and if it be behind and demanded that the Grantee shall distrein, he may demand after the Day to enbale himself to distrein.

Regularly the Feoffor re-entering shall be seised of the same Estate he had before the conditional Estate was made; yet if one seised in his Wife's Right make a Feoffment on Condition, and die, and his Heir enter for the Condition, broken, his Estate presently vanishes, and vests in the Wife, for it is impossible that he should be seised as the Feoffer was in Right of the Wife. If *cestuyque* Use before the 27 H. 8. 10. had made such Feoffment and re-entered, the Estate would have been wholly in him, and yet before the Feoffment he had only an Use, for by the Feoffment the Privity between him and the Feoffees was wholly dissolv'd. If Ten't in special T. make such a Feoffment, and then his Wife die without Issue, and he re-enter, he becomes Ten't in Tail *apres*. Such Feoffment of Land holden by Homage Ancestral, or of Copyhold Land escheated, destroys the Privilege, because by the Feoffment the Continuance of the Prescription or Custom is interrupted. Lord seised of Rent grants it on Condition, Ten't attorns, the Condition is broken, he may distrein, but can't have (a) Assise without a new (a) *Contra* *Reisin*, Ten't T. makes a Feoffment on Condition, and dies, the Condition is broken, his Issue enters, if he be within Age he shall be remitted, but if he be of full Age, he shall not, for by his Entry in Respect of the Condition descended to him as Heir in Fee, he waives his Title as Heir in T. by Force whereof he might have recovered in *Formedon*. Ten't L. makes such

Vid. *supra*.
159.

(a) *Contra*
4 Rcp. 9. b.

such Feoffment, and re-enters for a Breach, he shall be Ten't *L.* again, but subject to the Forfeiture; *for the Lessor's Right of Re-entry once vested in him for the same, shall not be lost by the Lessee's Re-entry for the Condition broken.*

203.

One may reserve Rent on Condition that if it be behind he shall re-enter and hold the Land till he be satisfied, or paid the Rent behind; and in this Case, if all or Part of the Rent be unpaid at the Day, he may re-enter, but when-ever the Feoffee pays, or tenders on the Land all the Arrears, he may enter again. And *Note* That tho' the Feoffor accept Part of the Rent, he may enter and hold the Land till he be paid the Whole. The Feoffor by his Re-entry gains no Freehold, but an Interest by Agreement of the Parties to take the Profits in Nature of a Distress. Therefore if one had made a Lease *L.* on such Condition, and re-enter'd for Non-payment, he could not have had an Action of Debt for the Rent *before* (a) 8 *Qu. A.* for such Re-entry defeats not the Lessee's Freehold.

(a) Vid.
Supra, 72.

When the Feoffor or Lessor, &c. re-enters by Force of such a Condition, the Profits shall not go in Part of Satisfaction; but if the Words were, that he should hold the Land till he be satisfied thereof, the Profits should be accounted Parcel of the Satisfaction, and during the Time that such Lessor takes the Profits, he shall not have Debt for the Rent in Satisfaction whereof he takes the Profits.

If a Feoffment be made to B. and his Heirs, *sub Conditione quod idem B. solvat Talem Redditum, &c.* or *Proviso semper quod idem B. Solvat, &c.* or *ita quod idem B. Solvat, &c.* in these Cases the Feoffor may re-enter for Non-payment, tho' it be not expressly said in the Deed that he may re-enter. If a Man make a Lease T. by Indenture, provided always, and it is covenanted and agreed between the Parties, that the Lessee shall not alien, this is both a Condition and Covenant.

The Word *Proviso* sometimes amounts to a Limitation or Qualification, and sometimes to a Covenant.

These Words in a Deed, *Quod si contingat Redditum Prædictum a retro fore*, give a Re-entry, if a Clause of Re-entry be added, not without it. But the other Words of themselves make the Estate conditional, and yet it is usual for the Satisfaction of the common People to add a Clause of Re-entry, as it is Common to put a Clause of Distress into a Lease after the Reservation of Rent; but *que Dubitationis Causâ tollendæ inferuntur, non lædunt Communem Legem*; therefore, tho' the Distress be reserv'd if the Rent be unpaid a Week or a Month, yet the Lessor may distress the next Day after it is due, for the Words are Affirmative, and restrain not the Law.

If an Annuity of Rent be granted *pro unâ acrà Terræ*, or *pro Decimis*, or *Concilio*, and the first be lost, or the last denied, the Annuity ceases, for it is Executory, and partly in

out Payment by the Grantor, and the Law will not compel the Grantor to pay it when the Consideration for which it was granted ceases. But such Words make not a State in Land conditional, for it is executed.

f. n. b. 205.
G.

Yet if a Woman make a Feoffment to a Man upon account of an intended Marriage which is called a Feoffment, *causa Matrimonii Prælocuti*, as if she gives Land with such Intent to a Man whom she engages herself to marry, and his Heirs, to assure him of her Faith and Constancy, and she afterwards marry him, or he refuse to marry her, or if she give Land to another to re-inceff her and such a one whom she intends to marry, who afterwards refuses to marry her, she may enter. But such a Feoffment by a Man to a Woman is not conditional without apt Words of Condition, but in the former Case the Law favours the Modesty of Women, which restrains 'em from asking Advice of Counsel In Cases of this Nature.

One gives Land in Fee, *ea Intentione*, that the Feoffee does such an Act, or *ad Faciendum*, or *pro Faciendo*, or *ad Propositum*, yet such Words make not an Estate conditional, except in the Case of the K. or of a Will. But a Lease T. is not conditional by such like Clauses as these, *viz.* and he shall or shall not do so or so, on Pain of Forfeiture, &c.

205.

If A. make a Feoffment on Condition that on Payment of so much Money he shall re-enter, this is call'd a Feoffment in Mortgage.

If such Feoffment be made, on Condition that if the Feoffor pay such a Sum at a cer-

tain Day, he shall re-enter, and the Feoffor die before the Day, yet if the Heir pay or tender the Sum at the Day, he may enter, tho' the Words be, if the Feoffor pay, for the Heir has an Interest in Right in the Condition, and all the Intent of the Parties was, that the Money should be paid at the Day, and it is the same Benefit to the Feoffee to receive it from the one as from the other. So likewise the Executors or Administrators of the Mortgagor, or in their Default, the Ordinary may tender, and so may Guardian in Socage or Chivalry. And if the Heir be an Ideor, any one may do it for him out of Charity; but in other Cases the Feoffee is not bound to accept a Tender by a Stranger, yet if he do, and the Heir or Mortgagor agree, they may re-enter, for *omnis Ratihabitio retro trahitur, & Mandato equiparatur*.

If a Feoffment be, on Condition that if the Feoffor or his Heirs pay 20 l. before such a Day, &c. and before the Day he die without Heir, the Estate of the Feoffee shall not be avoided, for when a Condition is possible at the Time of the Making the Estate, and after becomes impossible by the Act of God, the Estate of the Feoffee is unavoidable, for being executed and settled in him, it can't be defeated but by Matter subsequent, viz. the Performance of the Condition. But if the Condition of a Bond or Recognizance be possible when made, and afterwards become impossible by Act of God, the Bond or Recognizance is sav'd, for they are Executory, *and transfer no Interest*

206.

terest, but only give a Right of Action to be brought in Futuro, upon the Default of the Obligor, before which there can no Advantage be taken thereof. If a Feoffment be made on Condition to do a Thing that is *Malum in se*, as to kill *J. S.* the Estate of the Feoffee is absolute, and a Bond made on such Condition is void, for the Estate settled in the Feoffee shall not be defeated, nor shall a Bond be forfeited for the Forbearance of such an Action, and (a) an Obligee is punishable for taking such a Bond to do a Thing against the Law.

(a) 2 Ven.
309.

But if the Condition of a Bond be impossible at the Time of the Making thereof, as for the Obligor to go to *Rome* the next Day, the Bond is single, for it is the same as if there were no Condition at all; and a Feoffment on Condition that the Feoffee go to *Rome* on a Day, is absolute, for the Condition is repugnant to the Feoffment: But if an Estate be to arise, or a Duty to commence on a precedent Condition, that is impossible, they can never have Effect.

None shall take Advantage of a Condition that is himself the Cause of the other's not Performing it, as if one disseise and hold out by Force the Feoffee, that is by Condition bound to re-infeoff him; or if the Obligee marry the Woman that the Obligor is bound to marry.

A Condition in a Feoffment, that the Feoffee shall not alien, is void, because it is repugnant to the Estate: but a Bond with Condition that the Feoffee shall not alien or not take the Profits, is good.

If the Husband be bound to infeoff his Wife, the Condition is void, and the Bond good; but if he be bound to pay Money to the Wife, that is good.

In all Cases of Condition for Payment of a certain Sum in Gross, touching Lands, if a lawful Tender be once refused, he that ought to pay it is discharg'd for ever. But this is to be understood when a Feoffment is made with Condition of Payment of Money in Nature of a Gratiuity, for if there were a Debt precedent for the securing whereof the Feoffment was made, tho' the Feoffee refuse to accept it, yet he may have an Action of Debt for it.

Co. L. 209.

A Tender may be made in Foreign Money currant by Parliament or Proclamation, and it is sufficient to tender it in Bags without shewing or telling it, for it is the Part of him that is to receive it to put it out and tell it.

Co. L. 208.
9.

If *A.* be bound in 100*l.* with Condition of Payment of 50*l.* at a Day to come, and he tender the 50*l.* at the Day, he saves the Penalty, yet if he plead the Tender and Refusal, he must also plead that he is yet ready to pay the Money, and tender it in Court, for the Money tendred was Parcel of the Sum contain'd in the Obligation, *and the Tender shall be intended to be made to save the Penalty*: But if the Plaintiff take Issue on the Tender, and that be found against him, he loses the Money for ever for his false Plea. And if the Condition of a Bond be to do a Collateral Act, and the Obligee refuse to accept a Tender thereof the Oblige

(a) Contra.
Dy. 24.
Pl. 154.

gor is discharged for ever. And if *A.* be bound in 100 Quarters of Wheat for the Delivery of 50. and tender the 50 at the Day, he shall (a) not plead *Uncore Prift*, for they are *bona Peritura*, and it will be a Charge to keep 'em. If Obligee or Conusee make a Defeasance of a single Bond or Statute on Condition of Payment of a lesser Sum at a Day, and the Money be tendred at the Day, the Obligee or Conusee have no Remedy either for the Sum in the Bond, or Defeasance. *For the Force of the Bond is taken off as long as the Defeasance continues in Force, which must be till there be a Default in him to whom it was made; nor can an Action be brought on the Defeasance, which only frees the Party from an Action, &c. but does not of it self give another.* If Obligor be bound to infeof the Obligee, and he make a Lease, and Release to him and his Heirs, by this he sufficiently performs the Condition.

If a Feoffment be made on Condition, if the Feoffee pay on such a Day so much Money, that then he shall have the Land to him and his Heirs; this Condition is void, for he had a Fee by the Words precedent, but if these Words be added, that if he do not pay, &c. that then the Feoffor may re-enter, this makes the Estate conditional: And if the Feoffee before the Day make a Feoffment, either the first or second Feoffee may pay it at the Day; the first, because he is privy to the Condition; the second, because he has an Interest in the Condition for the Safe-guard of his Tenancy.

If a Feoffment be made on Condition that

that if the Feoffor pay such a Sum he shall re-enter, without limiting a Day, the Law appoints the Payment to be at any Time during his Life, *for the Feoffee can be at no Prejudice by the Feoffor's being allowed so long a Time for Payment of the Money, because he has the Land in the mean while in Satisfaction thereof.* Yet if he die before he pays it, his Heir can't perform the Condition, because the Time limited by Law is expired. If the Condition of a Bond be to do a transitory Act, (*i. e.* an Act which may be done in any Place) or a local Act which may be done in the Absence of the Obligee, it must be done presently, *i. e.* in convenient Time, *for that is most for the Advantage of the Obligee, and a Deed is taken most strongly against him that makes it;* but if the Concurrence of both be requisite, the Obligor has Time during Life, unless he be hastened by Request.

If an Obligor or Feoffee be by Force of the Condition of a Bond or Feoffment to pay Money, or make a Feoffment to a Stranger, they must do it presently, and must give Notice to the Stranger, and they shall not save the Condition by making a Tender thereof, if the other refuse to accept of it, *for where one undertakes to do an Act to a Stranger, he must at his Peril take Care of the Performance of it.* But if a Mortgagor or his Heir, &c. tender the Redemption-Money to the Mortgagee on the Day, and he refuse to accept it, the Mortgagor may re-enter. In like manner an Obligor bound to infeoff the Obligee, shall save the Bond by Tender and Refusal. If the Feoffee be by Condition

to make a Gift *T.* or grant a Rent Charge to a Stranger, and he make a Tender, and the other refuse it, the Feoffor shall not re-enter, for it was intended that the Feoffee should have something in the Land, which by Re-entry of the Feoffor he would lose: But if he were to make a Feoffment to a Stranger, and he tender it to him, and the Stranger refuse, the Feoffor may re-enter, for in such Case he is merely designed as an Instrument to convey the Land to another.

Contra:
Perk. 756.

Co. Lit.
211. a.

If *A.* be bound to *B.* that *C.* shall infeoff *D.* *C.* has Time during his Life to do it, unless he be hastened by Request, and if *C.* make a Tender thereof, and *D.* refuse, the Bond is saved, for the Obligor undertakes not to do any Act himself, but his Intent is to engage for the Readiness of a Stranger to do an Act to another, *who shall be intended to be a Friend of the Obligee, and under his Influence.* But in the said Case, if the Condition were, that *C.* should infeoff *D.* on such a Day, *C.* must seek *D.* and give him Notice thereof, and request him to be on the Land at the Day.

Co. L. 208.
b.

Sometimes in Respect of the Nature of the Thing to be done, the Obligor has not Time during his Life, as if the Condition of a Bond be to grant an Annuity to the Obligee, payable Yearly at *Easter*, the Grant must be made before the next Feast of *Easter*.

A Condition requiring the sole Labour of the Feoffor or Obligor, or a Stranger, as to go to *Rome*, &c. may be done at any Time, nor can it be hastened by Request.

If the Feoffee in Motrgage die before the Day of Payment, the Money shall be paid to his Executors, not to his Heirs, unless they be nam'd; but if they be nam'd, the Payment can't be made to the Executors, for *Designatio unius est exclusio alterius*. If the Payment be to be made to Executors, and they agree before the Money is paid to repay Part, such a Mock-Payment is no Performance of the Condition. If the Condition be, that the Feoffee shall pay to the Feoffor, his Heirs or Assigns, he may pay to the Executors of the Feoffor, for they are his Assigns in Law, *and he can make no Assigns in Deed of the Money or Condition*; but if the Condition be, that the Feoffor shall pay to the Feoffee, his Heirs or Assigns, it can't be paid to the Executors of the Feoffee, but his Assigns shall be taken in the natural Sense of the word for his Assigns of the Land, and where there may be Assigns in Deed, the Law will not make Assigns by Construction, and in that Case it may be paid to the first Feoffee or the second.

A Mortgagor or Obligor must on the Day of Payment seek the Mortgagee or Obligee, and tender the Money, &c. if the Mortgagor, &c. be in the Realm of *England*; but if he be out of the Realm of *England*, the other is not bound to seek him there, but shall have the same Benefit as if he had made a Tender.

And the Ten't that holds by corporal Service to the Person of the Lord, ought to seek the Lord, &c. but a Man is not bound

to tender Rent any where but on the Land.

If one be by the Condition of a Bond or Feoffment to pay such a Sum at a certain Place or any Time during his Life, he ought to give Notice when he will pay it, and if he tender it according to such Notice, or if at any Time he meet the Obligee or Feoffee at the Place and tender the Money, he saves the Penalty, &c.

If a Condition be broken by Non-payment of Rent, the Feoffor may either enter, or if he have had Seisin of the Rent, he may bring his Assise, or he may distrein for it, (if it be such Rent to which a Distress is annex'd,) but after he has brought an Assise or taken a Distress, he can't after enter for that Breach, so if he accept a Rent due at a Day after, for these Acts affirm the Lease to have had a Continuance after the Breach of the Condition. But he may receive and acquit the Rent, *the Non-payment whereof was a Breach of the Condition*, and then enter, *but this must be understood of a Rent reserv'd on a Lease T. which may be receiv'd as a Debt due on the Contract, but Rent reserv'd on a Lease L. could be no otherwise due but as Rent, before the 8 Qu. Anne, and therefore a Receipt thereof dispens'd with the Condition for the Time.*

3. Rep. 64.
b.

212.

It is most adviseable to appoint the Money to be paid at a certain Time, and Place, and then the Feoffor is not bound to seek the Feoffee in any other Place, nor to be there longer than is comprised in the Indenture, nor is the Feoffee bound to receive it

in

in any other Place: But if he receive it at another Place, or before the Day it is sufficient.

If the Condition be to pay so much Money, and the Feoffor pay to the Feoffee a Horse, or give him a Statute, or a Bond, or pay Part in Money, and be allowed for the rest upon Account, in Consideration of a Debt due to him from the Feoffee, or give any other Thing in Satisfaction of the Money, and the Feoffee receive it in full Satisfaction, this is a good Performance, tho' the Thing paid be not worth, the 20th Part of the Money; *for the sole Intent of the Condition is to enrich the Feoffee to the Value of so much as is express'd therein which whether it be done in Money, or what he esteems worth the Money is all one in Effect*, and less Money may be paid at another Day or Place in full Satisfaction of the Whole, *for perhaps it may be more beneficial to the Feoffee than the Payment of the Whole at the Day and Place appointed*, but a less Sum can't be paid in full Satisfaction of the Whole at the same Day and Place, for it is apparent, that a lesser Sum can't be a full Satisfaction of a greater; yet a Receipt of Part, and an Acquittance under Seal in full Satisfaction of the Whole, is sufficient; because the Party by his Deed acknowledges himself satisfy'd of the Whole. But if the Condition be to give a Horse, &c. or do any collateral Act, Money given in Satisfaction discharges it not, *for the Condition contain'd in the Deed can't be altered by Parol Agreement, and the Payment of Money, and the Giving of a Horse, &c. can't be said to be*

the

the same Thing in Substance. And if Money be to be paid to a Stranger, he can't accept of a collateral Thing in Satisfaction, *for it shall not be in the Power of a Stranger to defeat the Estate of another without a strict Performance, according to the very Words,* but if Money be to be paid by a Stranger to the Feoffee, he may accept other Things in Satisfaction.

213.

A Man makes a Feoffment on Condition that the Feoffee and his Heir shall pay a Rent to a Stranger and his Heirs, this is a good Condition, yet such Payment is not properly Rent, because it issues not out of Land, and an Assise lies not for it; and yet if it be not paid the Feoffor shall re-enter, and the Feoffee ought to seek the Stranger. for the Payment is but of a Sum in Gross, *A.* seis'd of Land joins in a Feoffment with *B.* rendring Rent to them and their Heirs, and the Feoffee grants that it shall be lawful for 'em to distrein for the Rent, this is a good Grant to both, because *B.* is a Party to the Deed.

And here *Note,* That Rent, which is properly Rent, can be reserv'd to none but the Feoffor, Donor, or Lessor, or to them and their Heirs, yet one may reserve 20 s. to himself for *L.* and a Pound of Comyn to his Heirs; but if he reserve Rent to himself or his Heirs, it is void as to his Heirs. If two Jointenants make a Lease by Deed Poll, or by Parol, reserving Rent to one of them, it shall enure to both; but if the Lease were by Indenture, it would be good to him only to whom it was reserv'd, because

cause he was privy to the Lease. If two Jointenants, one for *L.* the other in Fee, join in a Lease *L.* or Gift *T.* rendring Rent, it shall enure to both. If Lessor *L.* and his Lessee join in a Lease *L.* or Gift *T.* rendring Rent, it shall go to Ten't *L.* only, during his Life, *because the Possession is wholly derived from the Estate of the Lessee during his Life*; and at Law, if they had join'd by Deed in a Feoffment, the Feoffee should have holden of the Ten't *L.* only, whilst he had liv'd,

Note, Secondly, That neither an Entry nor Re-entry can be reserv'd or given to any Stranger. But the Heir may take Advantage of a Condition, whereof the Feoffor himself could not; as if the Condition be, that if the Heir pay 20 s. &c. that then he shall re-enter, for the Heir is privy in Blood, *this was disinherited by the Feoffment, and is a particular Exception in Favour of the Heir out of the general Rule, for (a) such* Reservation of Rent or other Hereditament is void.

214.

(a) Contra.
Ho. 130.

A Stranger being Grantee of a Rev'n may take Advantage of a Limitation, that *Ipso Facto* determines the Estate without Entry, but at Law he had no Benefit of a Condition, which determines not the Estate without Entry.

A Condition annexed to a State of Freehold, by such Words as these, That if the Party do so or so, that then the Estate shall cease and be void, defeats not the Freehold without Entry; but such Words in a Lease *T.* avoid it without Entry, and the Grantee of

of the Rev'n might always take Advantage thereof; but if the Words were, That the Lessor might re-enter, the Grantee had no Benefit thereof before 32 H. 8.

Where the Estate is but voidable by the Condition, Acceptance of Rent after makes it good; but where it is void, it doth not.

Successors of Bishop, &c. shall take Benefit of a Condition reserv'd by him, Executors or Administrators of that reserved by Lessee *T. Cestuyque Use*, not his Feoffees, shou'd have taken Advantage of a Condition on a Feoffment made by him. Any Grantee of the Rev'n may have Benefit of a Condition in Law.

And by 32 H. 8. 34. every Grantee of a Rev'n may take Advantage of a Condition reserv'd on a Lease, which Statute has been thus expounded.

1. That it extends to the Grantees of a common Person as well as of the *K.* and to the Grantees of the *K.*'s Successors, tho' the King only be named: But not to Grantees of Rev'ns on Gifts *T.* for the Word in the Statute is Lessees.

2. But it extends to Assignees of Part of the State of the Rev'n, as when the Rev'n on a Lease *L.* is granted for *L.* or a Rev'n on a Lease *T.* is granted for *T.* because the Act speaks of Executors of the Grantees; But not to Assignees of the Rev'n of Part of the Land; in which Case the Condition being entire, and against common Right, is destroyed; except the *K.*'s Case, in whom the Condition still remains, [*tho' he have granted Part of the Rev'n, for so much as remains in him,*

but the Grantee shall not take Advantage of it:] And in the Case of a Subject, the Condition may be apportioned by Act of Law, as when Part of the Rev'n goes to the Heir at Law, and the other to the Heir by Custom of Borough *Englisch*.

3. A Power of Revocation may be extinct as to Part, and remain for the rest; for it is in Nature of a Limitation, not of a Condition.

4. When Attornment was necessary, the Grantee could not take Benefit of the Condition without it.

5. The Statute extends to Bargainee, or any other that comes in by Execution of the Use to the Possession, tho' they be not in the *fer* by the Bargainor, &c. for the Act says Assignees to and by; but it extends not to Lord by Escheat, or Claiming by Reason of Mortmain.

6. Bargainee, &c. can't take Benefit of a Condition without giving Notice to the Lessee.

7. The Condition must be for doing something incident to the Rev'n, or for the Benefit of the Estate, as for Payment of Rent, Repairs, &c. not for doing any Thing in gross, for the Act puts Examples of the first Sort only:

And by the said Statute all Covenants and Agreements concerning the Land are transferr'd to the Grantee.

If the Rev'n escheat the Lord shall distrein for the Rent reserv'd, but shall not enter for a Condition broken; but Guardian in Socage or Chivalry may.

If

216.

If Land be granted for two Years on Condition that if the Grantee pay 20 s. in the two Years, then he shall have Fee, yet he shall not have Fee by paying of it; for tho' a Condition encreasing an Estate may be by Parol, yet no Freehold can pass without Livery. But if an Estate be granted for five Years, and if the Grantee pay 40 s. within the first two Years, that then he shall have Fee, or otherwise but for five Years, and Livery be made, now has the Grantee a Fee conditional by Construction of Law, and yet the Words seem to make the Condition precedent; but inasmuch as the Livery can't expect, but must give a present Freehold or none, (for which Cause a Lease *T. Rem'r* to *J. S.*'s Heirs is void,) this shall be construed a Condition subsequent; for the Law will often transpose Words, that a Feoffment or Grant may take effect, as if at *Christmas* an Annuity be granted, or a Rent reserv'd on a Lease, payable Yearly at *Michaelmas* and *Lady-day*; yet the first Payment shall be at *Lady-day*, for otherwise it would not be paid Yearly. But if a Thing that lies in Grant be granted for *T.* with such Condition, the Fee shall not Pass till it be performed. And the *K.* by Letters Patents may grant Land for *T.* with Condition to have Fee, and it shall be a precedent one. As to the Authorities that seem to contradict *Littleton*, they ought to be understood thus, That a Lease *T.* was first made, and afterwards an executory Grant to enlarge the Estate on Condition, and in such Case the Freehold passes not till the Condition is performed.

217.

A Lease

A Lease *L.* is made to a Man and Woman on Condition that whichsoever of 'em shall first marry shall have Fee, and they intermarry, neither of 'em shall have it for the Inter-
 tainty. A Lease *L.* is made with Condition to encrease the Estate on Payment to the Lessor at a Day, and before the Day he is executed for Treason, the Estate shall not encrease, tho' the Condition became impossible by the Act of the Lessor.

He that will take Advantage of a Condition, must enter if he can; if he can't, he must claim: For a Freehold, whether it lie in Grant or Livery, can't cease by Condition without Entry or Claim, tho' the Words are, *Proviso*, that if he don't pay, &c. that then the Estate shall cease, and be void; whether the Conveyance were by Feoffment, Bargain, and Sale, or Devise, &c.

But in the Case above, where a Grant was made for five Years on Condition to have Fee on Payment of 40 s. in the first two Years inasmuch as the Fee pass'd from the Lessor by Construction of Law, it shall be re-vested by Non-performance of the Condition by like Construction, without Entry or Claim. So if the Feoffee on Condition collateral, *i. e. not consisting in Payment of Rent*, lease to the Feoffor, rendring Rent, and the Condition be not performed, the Feoffor shall retain the Land, and the Rent is extinct; and the Condition being collateral, was not suspended by the Feoffor's taking the Lease, as it would have been if it had consisted in Payment of Rent. So if a Man grant a Rent out of his Land on Condition, and it be broken,
 or

or covenant to stand seisd with Power of Revocation, and revoke, in all these Cases no Entry or Claim is required; because he that is to take Benefit of the Condition is already in Possession of the Land.

An Estate may be surrendered on Condition: But if Lessee for 40 Years, take a new Lease for 20, on Condition, &c. or a Grant of the Rev'n on Condition, and afterwards the Condition be broken, his Lease for 40 Years shall not revive; for it was absolutely extinct by the Surrender, and the Condition was not annexed to the Surrender, but to the 2d Estate only. If a Guardian in Chivalry be enfeoff'd by the Infant, this makes him a Dis'sor, and absolutely surrenders his Estate, and yet the Feoffment was void as against the Infant.

A. makes a Lease *L.* reserving a Rose the first 7 Years, and if he will hold over, then reserving a Rent in Money, Lessee will not hold over, but surrenders, in this Case, in Judgment of Law, he had but a Lease for 7 Years, *ab initio*. So if one make a Lease *L.* and if Lessee in one Year pay not 20 s. that then he shall have it but for two Years, his Freehold determines by Non-payment, and he has it but for two Years.

Vid. Bro.
Covin. 16.

219.

A. makes a Feoffment on Condition that the Feoffee shall give the Land to the Feoffor and his Wife, in Special *T.* Rem'r to the Heirs of the Feoffor, and the Feoffor dies before such Gift is made, the Feoffee ought to make it as near the Intent of the Condition as may be, *viz.* to let the Land to the Wife without Impeachment of Waste, Rem'r to the

the Heirs of the Body of her Husband of her Body begotten, Rem'r to the Husband's right Heirs. And if she accept a State for L. tho' it have not the Clause of being without Impeachment of Waste, or if she marry, and a State be made to her and her Husband for her Life, yet is the Condition well performed, for she receives the Estate design'd in Substante; and the Omission of the Privilege of being without Impeachment of Waste shall not give the Heir of the Feoffor, for whose Benefit it was omitted, a Re-entry, (a) which would defeat the Estate of the Wife.

220.

(a) 2 Rep. 82. a.

(Note, This Clause, without Impeachment of Waste, gives the Lessee Power to cut down Trees, and convert 'em to his own Use; but the Clause *sans Impeachment per ascun Action de Waste* does not.)

If the Feoffor and his Wife both die, the Feoffee ought to make the Estate to the Issue, and the Heirs of the Body of his Father and Mother begotten, Rem'r to the right Heirs of the Husband. And if divers make a Feoffment on Condition that the Feoffee shall re-infeoff 'em, and they all die before the Re-feoffment, then ought the Feoffor to infeoff the Heir of the Survivor, to have and to hold to him and the Heirs of the Survivor; and in this Case the Heirs of the Father shall only inherit: But if the Limitation were to the Heirs of the Heir, then shou'd the Heirs of his Mother's Side inherit, which would be contrary to the Intent of the Condition.

220. b.

Vid. supra. 15.

If the Condition of a Feoffment be, that the Feoffee make a Gift in Frankmarriage to one

one not of his Kindred, or an Estate in Frankalmoine to a Layman, he must make a State *L.* in both Cases: *Which is the same Estate which would have pass'd if the Feoffee had used the very Words express'd in the Condition, nor does it appear to be the Feoffor's Intent that the Feoffee should convey an Inheritance.*

Tho' a Condition that saves an Estate be construed favourably, and that which destroys the Estate, strictly; yet if the Condition be, that the Mortgagor and *J. S.* pay 10 *l.* at such a Day, and before the Day the Mortgagor die, it is sufficient if *J. S.* pay it; yet if both be alive at the Day, the Mortgagee is not bound to accept of it from one only. But if a Lease for 20 Years be made to two, provided that if the Lessees die within the Term the Lessor shall re-enter; if one alien and die, he shall not enter till both are dead, for that is the manifest Intent of the *Proviso*: But in the first Case the Substance of the Condition is that so much Money be paid to the Mortgagee, and when the Act of God makes it impossible to be paid by both the Parties named, if it be paid by the other, it is sufficient, for it is in Effect the same Thing.

When the Condition of a Feoffment is to re-infeoff, or make a Gift *T.* to the Feoffor, or to him and a Stranger, the Feoffee has Time during Life to perform it, unless hastened by Request; but if he refuse when reasonably required by those that ought to have such Estate, the Feoffor

his Heirs may re-enter. But if it be to make a Feoffment or Gift to a Stranger, he must do it in convenient Time.

If the Condition be, that the Feoffee before such a Day shall re-infeoff the Feoffor, and before the Day the Feoffee die, his Estate is absolute, because when the Condition becomes impossible by the Act of God within the Time limited by the mutual Agreement of the Parties, the Feoffee is discharged. *Sed Q. of this Case; for by the express Intent of the Feoffment, the Feoffee is to be but an Instrument to re-convey the Land to the Feoffor, &c. and why should he not take Care that it be performed before he dies?* And in my Lord Clifford's Case, who having Licence to infeoff divers of *capite* Lands on Condition that they made to him a Gift *T.* did infeoff 'em according to the said Licence, it was adjudged that the Feoffees were bound to make the Gift in his Life, for the Licence did not extend to the Issue; and if the Feoffees should make a Gift to the Issue, K. might seize the Land for Default of a Licence, and the Land would not be in the same Plight as it was at the Feoffment: So if an Advowson be granted on Condition to re-grant it to the Grantor, the Grantee must make the Re-grant before the next Avoidance, or otherwise the Grantor would lose the next Avoidance: *And why should not the manifest Intent of the Parties also in the Case above, where a certain Time is limited, make it necessary for the Feoffee to re-convey before his own Death; for otherwise,*

219. a.

222. a. b.

therwise, the neglecting to perform the Condition, which was the sole Inducement of the Feoffment, would give him an absolute Fee if he happen to die before the Time; whereas by performing it, he should have nothing.

221.

When the Condition is, That the Feoffee shall re-infeoff, or make a Gift in Tail, &c. to the Feoffor, and the Feoffee before he performs it makes a Feoffment or Gift in T. or Lease L. or Y. in *præsenti*, or *future* to another Person, or marry, or grant a Rent Charge, or be bound in a Statute or Recognizance, or become profess'd; in all these Cases the Condition is broken, for the Feoffee has either disabled himself to make any Estate, or to make it in the same Plight or Freedom in which he received it; and being once disabled, he is ever disabled, tho' his Wife should die, or the Rent, &c. should be discharg'd, or he should be de-
 222. raign'd, &c. before the Time of the Reconveyance. But if the Feoffee be disseis'd and during the Dis's'in marry, or be bound in a Recognizance, and the Wife die, or the Recognizance be released before he re-enters, the Condition is not broken, because the Land was never charged.

But tho' the Feoffor be disabled to perform the Condition by Attainder, or such like, before the Day; yet if at the Day the Disability is removed, and the Condition performed, it is sufficient; for the Feoffee can be at no Prejudice thereby; but in the former Case the Feoffee by incumbering the Land contrary to the Intent of the Con-
 4
 dition,

gives the Feoffor a Right of Re-entry, which shall not be lost, tho' such Incumbrances be afterwards discharg'd.

If a Deed of Feoffment be made without any Condition, and Livery by Force of the Deed, because the Condition is not comprised in it, and it is of the same Force if no Deed had been made. *Before* 29

223.

Vid. supra, 80.

ar. 2. 3. If it were agreed between two, to make a Feoffment on Condition for coveny of Payment of certain Money, and the Livery had been made generally to the Feoffee and his Heirs, it was said, that the Estate should be conditional, because the Intent of the Parties continued at the time of the Livery, which should be intended to be made in Pursuance thereof.

A Condition annex'd to a Feoffment or Grant in Fee, (tho' it be of a new Rent,) to the Sale of one's whole Interest in a Chattel, that the Feoffee or Grantee shall not alien, is repugnant and void; for *ini-*

223. a.

um est liberis hominibus non esse liberam suarum alienationem: It is also against the Benefit of Trade, and would in great Measure restrain bargaining and contracting between Man and Man. But he that has a Rev'n may restrain his Donee, or Feesee, from aliening; and before the Statute of *quia emptores terrarum*, a Man might have made a Feoffment, and have added, that if the Feoffee, or his Heirs should alien without Licence, that they should pay a Fine: And some say, that he might have restrain'd the Alienation by

Condi-

Condition, (as *K.* may still do,) because he might have reserv'd a Tenure to himself in the Feoffment of *B.* Acre on Condition, that the Feoffee shall not alien *W.* Acre is good for it is not repugnant to the Feoffment of *B.* Acre, because that may be aliened without Forfeiture. If it be the Condition of a Feoffment, that the Feoffee shall not infeoff *J. S.* and the Feoffee infeoff *J. S.* on Purpose that he shall infeoff *J. S.* it is said this is a Breach; for *quando aliquis prohibetur fieri ex directo, prohibetur et per obliquum.* Whatever is prohibited by Statute or Common Law, as Alienations of Mortmain, &c. may be prohibited by Condition.

224.

A Condition annex'd to a Gift in *T.* that neither the Donee, nor his Heir, shall die without Issue, is good; so is a Condition in a Feoffment made to a Bishop, that neither he nor his Successor shall alien without Consent of the Chapter, for the Acts restrain'd by such Conditions are tortious. A Condition that a Husband and Wife, shall restrain their Alienation by Deed, but not by Fine; for that would be repugnant and void: It is said that such a Condition in a Feoffment to an Infant, shall restrain his Alienation during his Nonage.

A Lessor, in Respect of his Rev'n may by Condition restrain his Lessee from aliening, and Donor may by Condition restrain the Power which Ten't *T.* has by Statute to make Leases for 3 *I.* or 21 *T.* for *quod licet potest renunciare juri pro se introducto*

But an Estate *T.* has five essential Incidents, none of which can be taken away by any Condition. 1. To be dispunishable of Waste. 2. That the Wife shall be endowed. 3. That the Husband shall be Ten't by Curtesy. 4. That Ten't *T.* may suffer a Common Recovery. 5. That collateral Warranty, (*whether with or without Assets, if made before 4 & 5 Annæ 16.*) or lineal with Assets, may bar it.

If a Gift in *T.* with a Rem'r in Fee, be made to the same Person, with Condition not to alien, this is good as to the Entail, but void as to the Fee; therefore if such Donee make a Feoffment, and Donor re-enter, some say that he shall leave the Fee-imple in the Feoffee.

It is holden, that the Donor may make a Condition that the Donee may alien for the profit of his Issues.

If Lands be given in *T.* on Condition, that if the Donee die without Heir of his Body, that the Donor may re-enter, this is a void Condition, for when the Issues fail, the Estate determines by express Limitation; but if the Condition be, that if the Donee discontinue, and die without Issue, that the Donor shall re-enter, this is good; and being in the Copulative, both Parts must be performed before Donor can re-enter; but if the Condition be in the Disjunctive, it is sufficient to perform one Part. Lease for 20 Years is made to Husband and Wife, if he and his Wife, or any Child between 'em, shall so long live; The Wife dies without Issue, the Lease shall not de-

P

termine;

termine; for the Sense is, if Husband, or Wife, or any Child, &c. So if an Use be limited till *A.* shall come from beyond Sea, and attain his full Age, or die, the Use shall cease if he come from beyond Sea, or attain his full Age, or die.

A Man can't plead a Condition to defeat a Freehold without shewing a Record, or Deed to prove it; but a Condition to defeat the Grant of a Chattel, he may.

He that pleads a Deed, ought to shew it to the Court, that the Court may judge whether it have legal Words: And of ancient Time the Court, on View, judg'd it void if raz'd or interlin'd in Places material; but now it is left to be tried by the Jury, whether it were done before Delivery. The Deed it self must be shewn; nor can any Inrollment thereof, or Exemplification under the Great Seal be pleaded; but by Statute *a constat*, or *inspeximus* of Letters Patents made since the 27 *H. 8.* may be pleaded by *K.*'s Patentees, or any claiming under 'em, as well against *K.* as any other. *A constat*, &c. can only be of the Inrollment of Record; but not of a Deed or any other Writing, that's not of Record. Nor can a Deed be inroll'd till duly acknowledged.

3 Ed. 6. 4.
13 El. 6.

226.

* 10 Re.
94. b.
95. a.

Those that come in by Act of Law as Ten't in Dower, Statute Merchant, &c. may plead a Condition without shewing the Deed; but Ten't by Curtesy cannot, for the Law presumes that he had the Possession of his Wife's Deeds, * *and he may keep 'em during his Life*: Nor shall the Lord by Escheat

Escheat

Escheat, because the Deed belongs to him, nor any that claim by Conveyance from the Party, or justify as Servants by his Command, &c. plead a Condition without shewing the Deed.

Ten't T. makes a Feoffment on Condition; re-enters and dies; his Issue being remitted, needs not in pleading this Special Matter shew the Deed, *for he by the Remitter claims above the Condition.*

Ten't to a *Præcipe* pleads in Abatement of the Writ, (*for non Tenure*,) That J. S. infeoffed him on Condition and re-enter'd, and was not compelled to shew the Deed, because the Demandant was a Stranger, *nor did the Ten't make himself a Title against him by Force of it*; and it may be that on the Re-entry the Deed might be given up to the Feoffor. The Lessee of a Mortgagee evicted by the Mortgagor, may in an Action of Debt for the Rent by Mortgagee, shew the Condition and Re-entry without Deed, for he is no Way privy to it: And if the Feoffee after a Re-entry by the Feoffor, for Condition broken, enter and take away the Deed and detain it, the Feoffor in an Assise brought against him shall not be enforced to shew the Deed,

Vid. supra;

^{289.}

for the Feoffee shall take no Benefit of his own Wrong. A Woman may in pleading *aver* a Feoffment to be *Causa Matrimonii* *relocuti*, albeit she have not any Writing to prove it.

If a Condition on a Parol Lease L. (*made before* 29 Car. 2. 3. be broken, and the Lessee re-enter, and the Lessee bring an Assise,

and the Lessor plead *null tort*, &c. and the Jury find the Lease and Condition, and Re-entry in a special Verdict, the Court ought to give Judgment, that the Plaintiff shall take nothing by his Assise. But if after the Entry of the Lessor for the Condition broken, the Lessee re-enter, and the Lessor bring an Assise, and the Lessee plead in Bar the Lease *L.* made by the Plaintiff, saving the Rev'n to him, this is a good Bar because he owns the Rev'n to be in the Plaintiff, and the Lessor has no Remedy for he can't plead the Condition without shewing a Deed, and the Lease was without any. One can't plead a Lease *T.* in Bar of an Assise, as to say *Assisa non*; but he may justify by Force of the Lease, and conclude, *& iussit sans tort*; and if no Freeholder be named, he shall plead, *Nul Ten't del Franktenement nesme en le brief*. One may plead a Feoffment with Warranty in Assise, but he must rely on the Warranty; for otherwise, if it be a Feoffment of the Party himself on an Ancestor from whom he claims in Fee, the Plea would be double.

A Special Verdict may be given on a Special Issue, as well as on a General Issue and in Criminal Causes as well as Civil.

227. No Judgment can be given on an uncertain Verdict; as if in an Action against Executors, the Jury find upon the Issue of *Pleinment administre*, that they have Goods in their Hands not administered but do not ascertain the Value. And if they do not try the whole wherewith the

re charged, as if an Information be brought concerning 100 Acres and a House, and they find the Defendant guilty as to the Acres, but say nothing to the House, this is insufficient as to the whole: But if they find the whole and more, that which is more is Surplus, and shall not stay Judgment. And if the Matter and Substance of the Issue is found, it is sufficient.

The Jury may find Estoppels which bind the Interest of the Land, as the taking a lease of one's own Land by Indenture, and the Court ought to adjudge according to the Special Matter, (a) *as much as if it had been pleaded*; and they may find a collateral Warranty tho' it were not pleaded, because it binds the Right, but they can't find it in a Writ of Right where the *Mise* is join'd on the mere Right. (a) Cro. E. 140. + Rep. 53.

The Jury can't vary from a Verdict recorded, but before it is recorded they may vary from it. A Verdict shall be intended to be true till it be revers'd by Attaint; therefore no *Supersedeas of the Execution of a Judgment* is grantable on *bringing an Attaint to reverse it*. It is fineable for the Jury to eat at their own Charge after they are departed from the Bar, but it shall not avoid the Verdict: To eat at the Charge of one of the Parties before they are agreed, shall avoid the Verdict if it pass for him; but to eat at his Charge after they are agreed, *and have given a privy Verdict*, shall not avoid it. If either Party, or any for him, deliver a Letter, or any Evidence touching the Matter in Issue, 1 Vent. 125.

which was not produced in Court, it shall avoid the Verdict, if given for the same Party. But if the Jury carry away a Writing not sealed up that was given in Evidence, this avoids not the Verdict, tho' it ought not to have been done.

After their Departure from the Bar, they are to be kept in some convenient Place without Meat, Drink, Fire, Candle, or Speech with any but the Bailiff. In Civil Causes they may give a privy Verdict before any Judge of the Court, and then they may eat and drink; but they may vary from it, and the Verdict which they give in open Court shall stand: But in Criminal Causes of Life or Member, no privy Verdict can be given. And in such Causes the Jury sworn and charged, can't be (a) discharged till they have given a Verdict. (b) *If they can't agree in such Causes, they must be carried after the Judge in Carts till they agree.*

(a) Kel. 52.
contra.
(b) 1 Vent.
97.

If a Deed be made and dated out of England of Land lying here, yet if Livery be made *secundum formam cartæ*, the Land shall pass.

228. The Jury may in any Case, if they will take upon 'em the Knowledge of the Law, give a General Verdict; but if they mistake the Law an Attaint lies against them.

229. An Indenture is a Deed in Parchment or Paper indented on one Side or the Top, answerable to another, comprehending the same Matter: If it be actually indented, it is not necessary that it be said to be an Indenture; and if it be called an Indenture, and

and not actually indented, it is no Indenture. All the Parts of it are but one Deed in Law, therefore after the Estate determin'd, the Part of the Donee belongs to the Donor: If the Feoffor seal his Part, it is his Deed, tho' the Feoffee seal no Counterpart; and when the Feoffee has seal'd his Part, it is the Deed of both.

Some Indentures are in the 3d Person in this Form, *Hæc Indentura facta inter A. de B. ex unâ Parte, &c.* The Statute which says that Bonds in the 3d Person are void, must be understood of those taken in other Courts out of the Realm.

Indentures in the first Person begin thus, *Omnibus in Christo fidelibus ad quos, &c.* and tho' the Words of such Indentures are only the Words of the Feoffor, yet when the Feoffee has put his Seal, it is the Deed of both; but Mention must be made in the Deed that the Feoffee has sealed, for he is no Way privy to it being in the first Person, but by the Clause of putting his Seal to it.

A Lease is made for *L. Rem'r* in Fee on certain Conditions, and Lessee seals it and dies; he in *Rem'r* is bound to perform the Conditions, tho' he sealed no Part of the Indenture, inasmuch as he agrees to have the Land by Force of the Lease in which the Conditions are contained; but by Special Limitation the Conditions may extend to the Lease only.

A Lease *X.* is made to *A.* and *B.* and therein they grant to be bound to the Lessor in 20 l. in Case that certain Conditions in the Indenture were not perform'd, in an Action

of Debt for this, tho' it be a Sum in gross, both the Lessees must be named, albeit the Deed were delivered to *A.* in *B.*'s Absence.

A Feoffment is made by Deed-Poll on Condition, the Feoffor enters for a Breach, and gets Possession of the Deed-Poll: Some have said that he can't plead it, because the Property thereof is in the Feoffee. But the Law is otherwise for these Reasons.

1. If in an Action between 'em the Feoffee had shewn the Deed in Court, the Feoffor might have pleaded that it was made on Condition, &c. and by the same Reason when he has it in Hand, he may plead it, especially seeing that he is privy to it.

(*Note*, That when a Deed is shewn in Court, it remains there all the Term; and if not denied, is delivered to the Party at the End of the Term; if it be denied, it remains in Court till the Plea is determined.)

232.

2. If two do a Trespass, one may plead a Release to the other; so may Executors a Release to the Heir, so may a Joint-Obligor a Release to the other, tho' the Property of the Deed belong not to him that pleads it; but inasmuch as they are Privies, they can't plead the Deed without shewing it. An Action of Trespass may be joint or several at the Will of the Plaintiff, but an Appeal of Death must be sued against all the Defendants.

3. The Feoffee may grant the Deed to the Feoffor, and then the Property belongs to him; and when a Deed is shewn by the Feoffor, the Law rather intends that he came by it by lawful than wrongful Means. Tho' a Thing in Action can't be granted, yet the Deed

may

may, viz. the Wax and Parchment, and the Grantee may cancel 'em at Pleasure.

Sometimes the Law annexes a Condition to an Estate, which is as strong as if it were expressed in a Deed, as when one grants the Parkership of a Park for L. if the Grantee do not well keep the Park, or kill any Deer without Warrant, or cut down Trees, or Underwoods, and convert them to his own Use, &c. the Grantor may oust him, and grant it to any other. But without special Damage Non-attendance of it self is no Forfeiture of such a private Office, as it is of a publick one.

A Park is a great Inclosure privileg'd for wild Beasts of Chase by Prescription or K.'s Grant. Every Forest is a Chase, *non è converso*, but neither Forests nor Chases are inclos'd.

An Officer for Life, &c. that has only a collateral Fee, may be discharged of his Service, but he shall have his Fee; but where his Fee is to be taken out of the Profits belonging to his Lord within his Office, he can't be discharged.

Where the Condition in Law requires Skill and Confidence, as in Case of Offices, &c. an Infant, or *Feme* Covert not observing it, whether they come to the Estate by Grant or Descent, absolutely Forfeit their Interest: *For such Grants were Originally made in Consideration of the Capacity and Integrity of the Grantee, who when he becomes unqualified, the Granter may chuse another fit for such Service.* But if an Infant or *Feme* Covert break a Condition in

Law that requires no Skill or Confidence as when being particular Ten'ts, they make a greater Estate than they lawfully can, this is no absolute Forfeiture. Yet a Condition in Deed binds 'em *as much as if they were of full Age or unmarried, for the Law will not to the Prejudice of the Feoffor, and against his exprefs Reservation, make their Estate better than they receiv'd it.* But in Waste, a Recovery had against 'em, binds 'em for ever. For 'tis against the publick Good, and an irreparable Damage to the Inheritance. But in (a) cessavit against an Infant claiming by Descent he shall have his Age, and generally where a Statute gives an Entry, as for an Alienation in Mortmain, &c. Infants or Feme Coverts, shall not be absolutely barr'd.

(a) Co.Lit.
381. a.

Regularly, he that enters or recovers by Force of an implied Condition, whether by Law or Statute, shall not avoid precedent Incumbrances, except when Lessee for Life makes a Lease Y. and then enters and commits Waste, in which Case the first Lessor recovering in Waste, shall avoid the Lease Y. for the Statute says, he shall recover *Locum Vastatum*. It is said, If an Officer for Life have an House that belongs to his Office, and grant a Rent, and forfeit, that the Grant remains good for his Life, *sed Q.* For the Grantor of the Office is in no Default, and yet by the Act of his Grantee, would lose the Benefit of having the Office supply'd by so worthy a Man as might be induced to accept of it with its usual Appurtenances.

234.

By

By Statute, if an Officer concerning the Administration of Justice, or K.'s Treasure, Castles, &c. sell, or take Promise for the said Offices or any Deputation, he shall forfeit his Office, and the Contract shall be void, and the Buyer or Promiser, &c. disabled to hold the said Office, and this can't be dispens'd with by any *Non Obstante*, as it was resolv'd in Sir Ro. Vernon's Case, who being K.'s Cofferer for Money surrendred to the K. to the Intent that the K. might grant it to A. yet A. could not hold it.

5 El. 6. 16.

7 E. 6. 1.

Vid. supra

178.

Grants of Offices of Steward, Bailiff, &c. are subject to this Condition in Law, that the Grantees shall duly execute 'em, and they can't exercise them by Deputy, unless they were granted to be occupied by the Grantee or his Deputy.

Littleton calls Limitations Conditions in Law, as when Land is given to Husband and Wife during the Coverture; and such a State ceases by Death, or *Divorce a Vinculo*, which can only be *Causa Metus*, *Frigiditatis*, *Consanguinitatis*, or *Affinitatis*. By 32 H. 8. 38. all Marriages are lawful which are not prohibited by the Levitical Degrees; therefore, where a Man was question'd in the Spiritual Court for marrying his late Wife's Sister's Daughter, a (a) Prohibition was granted. But a Divorce a *Mensâ & Thoro*, which is allow'd for Adultery, shall not dissolve the Marriage a *Vinculo Matrimonii*, for it is subsequent to the Marriage, but in the other Cases the Marriage was unlawful, *ab initio*.

235.

(a) Quare.

2 Lev. 254.

3 Lev. 364.

Propert

Proper Words of Limitation are, *dum, dummodo, quamdiu, donec, quousque, ubicunque, usque ad, tamdiu*, or so long as he shall live Sole, or Chaste, or pay such a Rent, or be Abbot, or Parson, &c.

236.

Where one devises Land to his Executors to be sold, or his Land to be sold by his Executors, which is all one, if they sell not in convenient Time, the Heir may enter, and it is no Plea that the Money offered to 'em for the Purchase was not to the Value of the Land; but when one devises that his Executors shall sell the Land, they may do it at any Time, for in this Case they shall not take the Profits, but in the first Case they shall take the Profits, yet they shall not be Affets. *Quære.*

Vid. *supra.*
170.

Devise of Land *ad Solvendum*, or *Vendendum*, or paying so much to *J. N.* amounts to a Condition, and where one has two Daughters, and devises Land to one of 'em, paying 10*l.* to the other, the Sister for Non-payment may enter into a Moiety.

Estates of Inheritance executed *and settled in Possession* by Livery, or Release of Dis'see to Dis'sor, can't be defeated by Defeasance made after, but by Defeasance made at the Time of the Feoffment or Release they may for *quæ incontinenti fiunt in esse videntur*, but Rents, Conditions, Warranties, &c. may be defeated by Defeasance made afterwards, for such Inheritances are Executory.

237.

Tho' a Power of Revocation of an Estate passing by Conveyance at Common Law, be repugnant and void; yet where an Estate passes by Way of Use executed, by 27 *H. 8.*
such

Such a Power of Revocation of the Use, and consequently of the Estate, has been allow'd to be good: As if a Man covenant to stand seis'd to the Use of himself for *L.* and after to the Use of his Son in *T. &c. Proviso* that he may revoke any of the said Uses, and afterwards revoke 'em, he is seis'd in Fee again without Entry or Claim, and he may revoke Part at one Time and Part at another. But by making a Feoffment or levying a Fine of Part, he extinguishes his Power as to that.

Where the Power of Revocation is given to a Stranger, he can't any way release it, *for another may give me a Power over himself or his Estate, whether I will or no.* But such Power reserv'd to him from whom the Estate passes may be releas'd by Deed, or by levying a Fine, *which is a Release in Law, for it is in Nature of a Condition, whereby he may restore himself to his former Estate whenever he pleases, and consequently such Power, like other Reservations, may be releas'd.* By the same Conveyance by which the old Uses are revok'd, new ones may be limited.

Of Descents which take away Entries.

DEscents of corporeal Inheritances, either in Fee or in Tail, take away the Entry of him that has Right: As if a Dis's or die seis'd, and his Land descend to his Heir. But the Descent of incorporeal Hereditaments, puts not him that has Right to his Action.

Formerly

Formerly, if a Dis's'or had long continued in quiet Possession, or his Feoffee a Day and Year, the Dis's'ee could not have entered.

If Land be recovered against *A.* and he die before Execution, or if there be a Recovery against Lessee *L.* and he die, and the Rem'r Man also die seis'd before Execution, the Recoveror *may enter without being driven to a new Action, because it shall be intended, that if his Title be good against the one, it is good against the other.*

But if, after Execution had, the Recoveror had disseis'd the Recoveror, and died seis'd, the Descent should take away the Entry of the Recoveror, *but this is expressly contradicted in Keilway 45. b. because the Heir is privy to the Recovery.*

A. recovers against *B.* in a Writ of Right of Advowson, or is his Conusee of a Fine of the Advowson, and *B.* usurps the next Turn, *A.* is out of Possession, for at Law every Presentation by Wright or Wrong, puts all Persons to their Writ of Right.

By 32 *H.* 8. 33. no Dying seis'd &c. of a Dis's'or takes away an Entry unless he have been in quiet Possession for five Years after the Dis's'in; but 'tis said, that the Statute extends not to Abators or Intruders, nor to the Dis's'or's Feoffee; but it extends to all Dis's'ins with or without Force, and to Successors whose Predecessors were disseis'd, tho' it only speaks of the Dis's'or and his Heirs; if Lessee *L.* be disseis'd, and the dis's'or die within the five Years, and then Lessee die, it is said that Rem'r Man

can't enter, for his Entry was not lawful at the Time of the Descent, as the Statute speaks; but if the Lessee had died before the Descent, the Rem'r Man might enter. After the five Years, Dis'see must make continual Claim as before the Statute.

A Descent of an Estate in Tail also takes away the Entry of him that has Right, as when a Dis'sor makes a Gift in T. and Donee dies seis'd. But if the Donee discontinue, and disseise the Discontinuee, and die seis'd, his Issue is remitted, and Dis'see may enter, for the Estate that descended is vanish'd. So if an Estate T. descend, and after determine for Want of Issue, Dis'see may enter on him in Rev'n or Rem'r.

No Writ of Entry in the Post lay at Law after a Conveyance beyond the Degrees.

239.

Those that are in by Wrong, as Dis'sors, &c. Successors, K. being Grantee, K.'s Patentee, Ten't by Curtesy, Woman endow'd by Dis'sor, Lord by Escheat, Recoveror, Conusee of a Fine, Ten't by Execution of the Use by Statute, are all in the *Post*, but a Woman endow'd by the Heir, is adjudg'd in by her Husband.

Vid. supra, 82.

Tho' the Land be conveyed beyond the Degrees, it may be brought back, as if the Feoffee re-infeoff the 2d.

Rem'r Man after Death of Lessee L. is in the *per* by the Dis'sor.

To take away an Entry, there must be a living seis'd in Demesne, either in Fee, or T. and also a Descent; therefore, if a Dis'sor make a Lease to A. and his Heirs for B.'s Life, and A. die seis'd, or if he make a
Lease

Lease *L.* Rem'r to *K.* (whose Estate can't be wrongfully devested,) and the Lessee be disseis'd, and the Dis's'or die seis'd, such Descents of a State *L.* take not away the Entry of the Dis's'ee. But if he in Rev'n or Rem'r in Fee or *T.* disseise Lessee *L.* and die seis'd, this takes away the Dis's'ee's Entry. And a Dying seis'd in Law is sufficient, as if an Infant's Dis's'or die seis'd, the Infant comes to Age, the Dis's'or's Heir dies before he enters, this takes away the Entry of the Dis's'ee, (and yet if one that was only seis'd in Law make a Feoffment of other Land with Warranty, and die, such Land whereof he was only seis'd in Law, shall not be recovered in Value from the Heir.)

If a Dis's'or make a Lease *L.* and then die seis'd of the Rev'n, this takes not away the Entry of the Dis's'ee. And so if he make a Lease for his own *L.* and die, the Dis's'ee may enter, for tho' the Fee and Freehold descended from the Dis's'or, yet he died not seis'd thereof. But if he only make a Lease *T.* or suffer Execution of a Judgment in Debt, and die, the Dis's'ee can't enter.

240.

If a Dis's'or or his Alienee die without Heir, yet the Escheat of the Fee to the Lord takes not away the Disseisee's Entry; but if they had died seised, and the Land had descended, the Entry had been taken away, and then if the Land escheat after the Descent, the Dis's'ee cannot enter upon the Lord.

If a Feoffee on Condition die seised, and the Condition be broken before or after the Descent;

Descent; or if he be disseised, and a Descent cast, by which his Entry is taken away, yet the Feoffor may enter for a Breach, for he has no Action, and if he should lose his Entry, he should be without Remedy. In like Manner, he that has Title of Entry for Mortmain, Consent to Ravishment, or by Force of a Devise, or K's Patent, shall not lose it by a Descent, because it is the only Remedy.

Vid. *supra*,
165.

If a Dis'sor die seised, and his Heir enter and endow his Wife of the 3d Part, the Dis'see may enter on that, for she is in by her Husband, and the Law judges no mean Seisin betwixt Husband and Wife. A Mesne grants to acquit the Tenant against the Lord and his Heirs, the Lord dies, his Wife is endowed of the Seigniorie, the Acquittal extends to her, for she continues her Husband's Estate, and the Rev'n is in the Heir. A Dis'sor dies seised, the Dis'see abates, the Dis'sor's Wife recovers Dower against him by Confession; he shall not enter on her, but some say, if he had only endowed her in *Pais*, he might enter upon her. One makes a Gift in *T.* rendring 20 s. Donee dies without Issue, his Wife is endowed by the Donor's Heir, she shall be attendant to him for the 3d Part of the said Rent, and yet the Tail is spent, and the Rent reserved thereon determined. If there be Lord and Tenant, and the Wife of the Tenant be endowed, she shall be attendant for the Services of Right due, not for those increached.

241.

If

If a Dis's'or after the Descent take a State *L.* or if a Dis's'or make a Lease *L.* and grant the Rev'n to the *K.* yet the Dis's'ee by Re-entring on Lessee *L.* devests the Rev'n.

If a Feme Dis's'orefs marry, and die seised, and her Husband being Tenant by Curtesy die, and then the Land descend, or if Tenant in Fee, or *T.* die without Issue or Heir, leaving Wife *Privement Enseint*, and after the Issue is born, and the Land descends to him, yet this bars no Entry, because the Land descends not immediately after the Death of him that died seised.

After a Descent is cast, and the Dissee's Entry is taken away, if the Dis's'or come to a State of Freehold in the Land by Purchase or Descent, the Dis's'ee may enter, or have his Assise against him, for he can have no Benefit of the Descent, who is *Particeps Criminis*.

242.

If one die seised in Fee, or *T.* and leave two Sons, and the Younger whether of the whole or half Blood abate, and have Issue and die, yet may the Elder or his Heir enter, for it shall be intended, *That the Younger did not set up a new Title*, but that he claimed as Heir to his Father in *his elder Brother's Absence*, and that it was his Intent to preserve the Possession against Strangers; for this Reason, one Brother shall not have *Mortancestor*, against the other. And the Law is the same, if there be divers Descents, or if the eldest Brother enter into Burgh English Land.

Plowd.
Com. 306.
a.

If one Parcener enter generally, and take the Profits, this shall be accounted the Entry of them both ; but if she enter specially, claiming the whole Land, and taking the whole Profits, she is an Abator, and yet if she die seised, the other shall enter ; but if she make a Feoffment of all, and take back an Estate in Fee, and died seised, the other can't enter, for the Feoffment destroys the Privity. 243. Hob. 120.

And in the Case above, if the elder Son had entered first, or if the Father had made a Lease T. and the younger Brother had disseised the Elder, and died seised, the Entry of the Elder had been taken away, for *it can't be intended, that in these Cases the younger Brother affirm'd the Title of the Elder, or entered to preserve it when he disseised him to his own Use.* So if the younger Son's Feoffee die seised, the Defect takes away the elder Brother's Entry ; so if a Stranger abate, and the younger Brother disseise him and die seised.

If Ten't in special T. have Issue a Daughter, and takes a 2d Wife, and have a Son, who enters after his Death, and dies seised, this bars the Daughter's Entry, for they claim not by one Title.

An (a) Usurpation by one Parcener after Partition puts not the other out of Possession. (a) 2. Wats, 84.
If Parceners can't agree to present, the Church is not Litigious, so that the Ordinary may justify Refusing the Clerk of either, and suffer the Church to lapse, but he must take the Clerk of the Eldest. If the

Vid. Wats, 74.

Vid. supra,
125.

the youngest Son were found Heir on a Writ of *Diem Clausit Extremum*, the other had no Remedy. When two Parsons presented by one Patron, are in Debate for Tithes, no *Indicavit* lies; the Reason of all these Cases is, because the Parties claim by one Title.

244.

One seised in Fee leaves two Sons, Bastard Eigne, Mulier Puisne, the Bastard claims as Heir, and dies seised, and the Land descends to his Issue, the Right of the Mulier, or any other Heir lineal or collateral is remediless, whether the Descendants were of an Inheritance lying in Grant or Livery, and whether the Mulier, &c. be of full Age, or an Infant, or Feme Covert; and if the Mulier leave a Wife Privement Enseint, and the Bastard die, the Child born shall be barr'd; and the Law is the same if the Bastard become profess'd; or if he die in his Father's Life, and his Issue enter as Heir to the Grandfather, and die seised; and if there be two Daughters Bastard and Mulier, and the Bastard after the Death of the Father enter with her Sister and occupy peaceably and die, her Issue shall inherit, and if they make Partition, the Mulier shall be bound for ever. For *Injustum est aliquem post Mortem facere Bastardum, qui toto tempore Vitæ suæ prius Legitimo habebatur.* But this Rule holds only as to Bastard Eigne.

3 Lev. 410.

But a Mulier shall not be barr'd by the Bastard's dying seised, unless the Inheritance descend; therefore if the Bastard leave

leave a Wife Privement Enseint, and the Mulier enter before the Child is born, he saves his Right: Nor shall a Mulier be barr'd by an Escheat to the Lord of the Fee. Nor shall the Right to an Estate T. be barr'd by the Bastard's dying seised.

A *Mortancestor* lies not between a Bastard and a Mulier: And a Bastard being impleaded shall have his Age.

If a Wife have a Child born in Wedlock, tho' the next Day after Marriage, no Proof can be that it is not her Husband's, if he be within the Four Seas, *i. e.* in the K. of England's Jurisdiction, unless he have an apparent Impossibility of Procreation, as if he be but 8 Years old; *but it has been lately resolv'd, that it shall be presumed, that a Child born after a Divorce a Mensâ & Thoro is a Bastard, unless the Contrary be proved on the other Side.*

*Queen and
Inhabitants
of West-
minster.*

Note, That a Bastard here spoken of, is one born before Marriage, whose Mother is afterwards married to his Father, who is so much favour'd, because the Canon Law makes him Legitimate.

If the Mulier interrupt the Bastard's Possession, or a Stranger do it, and he agree in the Bastard's Life, (as when a Stranger enters to avoid a Fine, and within the five Years he that has Right Assents,) in this Case the Re-entry of Bastard, and his dying seised, bars not the Right of the Mulier; but if the Bastard recover in Assise against the Mulier, this avoids the Interruption of the Bastard's Possession by the Mulier's Entry.

245.

If

If the Mulier come on the Land by Consent of the Bastard, he shall not avoid his Possession thereby, but if he cut down a Tree, or do any other Act which must be either a Trespass or an Entry, he thereby avoids the Bastard's Possession, for where an Act may be done lawfully, the Law will not adjudge it to be wrongful.

If the Bastard enter, and K. seise for suppos'd Contempt, &c. of the Bastard and he die, and his Issue be restor'd on Petition, the Mulier is barr'd, for the Possession of K. when he has no good Right to seise, shall be judg'd to be the Possession of him in whose Right he seisd. But if after the Father's Death the Mulier be found Heir of *Kt. Service Land*, and with in Age, and K. seise, the Bastard is forever clos'd for ever; and if K. seise for a Contempt of the Ancestor, and the Issue of the Bastard be restored on his Petition, for that K. seised without Cause, the Mulier is not barr'd.

Any Stranger may enter of his own Head on the Dis'sor, or the Feoffee of Ten't and devest the wrongful Estate; but a Stranger can't enter on the Feoffee of an Infant of his own Head.

If an Infant be disseised, and a Disceinor cast during his Infancy, yet may he enter. But if one die seised, and leave a Wife and Privement Enseint, and a Stranger abate and die seisd, the Child born can't enter, for he is not so much regarded in Law, because he had no Right at the Time of the Descent.

If an Infant present not to a Church within 6 Months, it shall lapse; if the five years for making a Claim after a Fine begun in the Ancestor's Life, he must claim within them; if he do not claim a Villein descended into ancient Demesne within a Year and Day, he can't afterwards claim him; and he shall be barr'd in an Appeal of the Death of his Ancestor, if he do not bring within a Year and a Day; Ten't *T.* discontinues, Discontinuee dies, and leaves a Heir within Age, Ten't *T.* abates and is seised, his Issue is remitted, and the Infant can't enter; if *K.* die seised, the Infant is driven to his Petition; for in these cases the Law prefers the Good of the Church, the publick Repose of the Realm, Liberty, Life, an ancient Right, and King's Prerogative before the Privilege of Infancy.

A Descent cast of Land in which a Feme covert has Right of Entry, shall take away the Husband's Entry, but not that of the Wife or her Heirs after his Death; but if the Woman had Right of Entry, before she married, and being of full Age, had been married, the Descent cast during the Coverture had bound her. If a Rent be reserved on a Feoffment, and if not paid in a Month, to be doubled: An Infant neglecting the Payment shall not forfeit any Thing, but a Feme Covert shall, for the Statute *on current usuræ, &c.* extends not to a Feme Covert.

Four Sorts of Men may be said to be *Non Compos.* 1. An Idiot that is *Non Compos*

246.

4 Rep. 58. b.

Mert. ca. 5.

247.

pos from his Nativity. 2. One made by Sickness. 3. A Lunatick *qui aliquando gaudet lucidis Intervallis*, who is *Non Compos* only for the Time while he wants Understanding, 4. One that is drunk, who never favoured in any Case, *sed omne crimen ebrietas incendit & detegit*. If any of the three first be disseised, a Descent bars their Entry, for they can't in civil Cause disable themselves, for which Cause, if they recover their Memory, they can't in the Courts of Common Law avoid any Conveyance made by them during their Infirmary, *for a Matter of this Nature is more proper to be left to the Conscience of the Judge of Equity, but it seems against natural Justice to put such Persons recovering their Memory wholly without Remedy, where imposed upon when they wanted Understanding*. K. on an Office, finding a Person an Ideot or Lunatick, may avoid Conveyances made by them in *Pais*, but not those of Record, and so may the Heirs after their Death. And in criminal Causes they may disable themselves.

4 Rep. 126.
b.

The Heirs of one perpetually *Non Compos*, may avoid a Descent cast in the Line of such Ancestor by Entry or Action; they may avoid a Feoffment made by them or a Lunatick; and so Note, they have no Remedy as Heirs, which the Ancestors have not; so if Father disseise Grandfather and make a Feoffment without Warranty, and Grandfather and Father die, the Son may enter, tho' the Father could not. There are two Jointenants, one for *L.* the other in *P.*

the Heir of him that has Fee shall have
 waste, tho' the Ancestor could not.

An Infant disseises *A.* and makes a Feoff-
 ment to *B.* who dies seis'd, the Infant being
 within Age, the Infant enters upon his
 heir, *A.* may enter upon him; so, if a
 Dis's'or make a Feoffment on Condition,
 the Feoffee dies, and Feoffor enters for a Breach,
 the Dis's'ee may enter upon him.

If a Dis's'or be profess'd, the Descent to
 his Heir takes not away the Entry of the
 Feoffee, for it is originally owing to his
 own Act, but the Heir of one profess'd
 shall have his Age. If the Ten't to a *Præcipe*
 become profess'd, or resign, &c. the Writ
 states not, but if he be depriv'd it shall.

A Lessee *T.* is ousted, and he in Rev'n dis-
 seis'd, Dis's'or dies seis'd, yet may Lessee
 enter, for by it he defeats not the Freehold
 that descended. • So (a) if Grantor of three
 voidances usurp the first Turn, this puts
 the Grantee out of Possession.

If one disseise another in Time of War,
 which is call'd Occupation, and die seis'd
 in Time of War, Dis's'ee may enter;
 and if one present wrongfully to a Church
 in Time of War, he does not put the Pa-
 tron out of Possession, tho' the Institution
 were in Time of Peace. It is said to be
 the same of Peace when *K.*'s Courts are open.
 If a Body Politick die seis'd of Land, to
 which I have a Right of Entry, and
 the Land go to his Successor, yet I may
 enter.

There
 er in Fe

248.

249.

(a) Vid.
 Wars, 85.

250.

Of Continual Claim.

IF Dis'see make continual Claim unto the Lands, whereof the Dis'sor or his Donee or Feoffee is seisd, or he in Rev'n or Rem'r make continual Claim upon the Alienee or a particular Ten't guilty of a Forfeiture before a Descent cast, they save their Entry thereby notwithstanding the Descent. If Ten't *T.* or by Execution, be ousted, and he in Rev'n disseisd, yet may he in Rev'n enter to avoid a Descent or Collateral Warranty, or he may recover in Assise, and yet his Entry is not lawful to take the Profits; And some say that Lessor *L.* may do the same.

251.

If one make a Lease *L.* Rem'r *L.* Rem'r in Fee, and Ten't *L.* forfeit, and he in Rem'r *L.* claim, and Alienee die seised, and then he in Rem'r *L.* die, he in Rem'r in Fee may enter, for he could not enter before the Descent was cast; so if the Father having claim'd before a Descent cast die, his Son shall enter: But if he in Rem'r *L.* or Ancestor claim, and die before the Descent, that gives no Advantage to him in Rem'r in Fee or to the Heir, for the Claim of another shall not avail one that might have claimed himself, and did not.

252. *L.*

If there be two Jointenants and one claim and die, the other shall enter: If Ten't with Warranty, have Judgment to recover in Value, and die without Issue before Execution, he in Rem'r may sue Execution: If a Seigniori be granted for *L.* Rem'r in Fee

and Grantee *L.* die, he in Rem'r in Fee shall have a *per que Servitia*

Forfeiture of a particular Estate is either by Matter in *Pais*, or of Record; a Forfeiture in *Pais* is of Things that lie in Livery, when a greater Estate passes than the Ten't can lawfully make, whereby the Rev'n or Rem'r is devested. If Ten't *L.* and Rem'r Man for *L.* join in a Feoffment, both their Estates are forfeited. If Rem'r Man for *L.* affise Ten't *L.* and make a Feoffment, this forfeits the Right of his Rem'r. If *K.*'s Ten't or *Y.* make a Feoffment, the Solemnity of the Livery, tending to the *K.*'s Disherison, is a Forfeiture, tho' the *K.*'s Estate can't be devested. But no Grant by Deed can forfeit Things lying in Grant.

Forfeiture by Record is, 1. By Alienation, Fine and Recovery, whether it devest the Rev'n or Rem'r, as in case of Things lying in Livery, or devest them not, as in case of Things lying in Grant. But a Deed inroll'd loses no Forfeiture, *because the Deed it self makes the Conveyance, is meerly Mat- in Pais, tho' it be afterwards recorded.*

2. By Claim, either express, as when Ten't *L.* claims Fee in Court of Record, or Rec *Y.* brings Affise; or imply'd, as when Ten't *L.* joins the *Mise* on the meer Right, Lessee *Y.* loses in a *Præcipe*, and brings Error for Error in Process; for (a) a Writ Error to reverse a Recovery of a Freehold for the Ten't of the Freehold only and therefore it is a Forfeiture for Lessee *Y.* to bring it; at where Lessee *Y.* is summoned, and loses Default, he has no Remedy, but if he were

(a) Dyer.
90, 5.

Co Lit.
229. a.

summon'd, and did appear, he might have pleaded in Abatement that no Ten't of Freehold was nam'd in the Writ; if he were not
 1 Ro. 622. *summon'd, I suppose that he might have an Action grounded on the Deceit.*

252.

3. By affirming the Rev'n or Rem'r to be in a Stranger, as praying in Aid of, or attorning to the Grant of a Stranger, (but the Ten't shall not forfeit his Estate by attorning in *Pais*;) or by confessing the Action in a *Casu Provisio* brought by a Stranger, or by pleading covenantously to the Disherison of him in Rev'n or Rem'r or by pleading *Waste fait*, in an Action of Waste done by a Stranger, or by accepting a Fine of a Stranger *sur conusans de droit come ceo que il a de son done*.

Every particular Ten't may forfeit, whether for *L. Y.* or by Execution, as Ten't by Statute-Merchant, &c. and Ten't *apres*, and Lessee to him and his Heirs for Life of *J. S.* If Ten't *L.* make a Lease for *B.*'s Life, or on Condition, and *B.* die, the Condition be broken, yet the Forfeiture remains.

Supra, 782.

253.

If one have Cause to enter into diverse Lands in the same County, an Entry in Part in the Name of all, to which he has Right of Entry, regains the Seisin of all the same County; but a general Entry in any one Parcel, regains no more than that one Parcel: And if several Actions be required as if one be disseis'd by two several Dis'sors or by one Dis'sor, and he lease to three severally for *L.* there must be several Entries. But if he lease to many severally for Years

one Entry will be sufficient; so if I be disseis'd of several Parcels of Land by the same Person at several Times, or if several Parcels of Land be Subject to one Condition, one Entry is sufficient for all; but if the Conditions be several, there must be several Entries. Tho' Livery within View be good, yet a Claim within View where a Man may enter without Fear, is not. Livery of Parcel of Land in the Name of all in the same County, passes all.

If he who has a Title to enter, dare not enter for Fear of Battery, Maiming, or Death, if he go as near as he dares, and claim the Lands, he has presently by his Claim such a Seisin as if he had entred indeed, tho' he never had any Seisin before. But his Fear must concern his Person; for the Fear of the Burning of his Houses, or Loss of his Goods, is not sufficient. The Fear of Imprisonment, *or Mayhem*, is not only sufficient to make such a Claim equivalent to an actual Entry, but will also avoid a Deed executed by a Man under such Fear; but the Fear of Battery is not sufficient in the latter Case, but in the first it is, *for the Re-continuance of an ancient Right is favour'd in Law*. In pleading, some Cause of Fear must be shewn, and it must be no vain Fear: But in a Special Verdict, if the Jury find that the Disseisee did not enter for Fear of Corporal Hurt, this is sufficient, and it shall be intended that they had Evidence to prove the same.

Such an Entry in Law, tho' it shall be taken as much for one's Advantage as an Entry in Deed, as to avoid a Warranty, or to

enable one to bring an Affise, &c. yet it shall not be so to one's Disadvantage; therefore such an Entry by the Plaintiff in Affise abates not the Writ, but he shall recover Damages from the Beginning.

Continual Claim is well made, tho' it be made but once, when the Disseisee approaches as near to the Land as he dares, and claims in or out of View, but if he dare he must enter; yet a Claim within View reduces a Freehold in Law to an actual Freehold, tho' he that makes such Claim be not afraid to enter.

255. A dying Seis'd and Descent within a Year and Day after Claim made, takes not away the Entry of him that claim'd, tho' there be never so many Disseisins, Alienations, or Descents within that Time, and tho' it were not made till many Years after the Disseisin; but at Law a Descent cast within a Year and a Day after the Disseisin barr'd the Disseisee not making continual Claim; but this has been alter'd by 32 H. 8. 33. *Since which Statute no dying seis'd within five Years after the Disseisin takes away an Entry, and consequently the Ten't's dying seis'd within five Years after the continual Claim, takes not away an Entry, because the Ten't's continuing in Possession after the continual Claim amounts to a new Disseisin.*

256.

In the Computation of the Year and Day, the Day on which the Claim was made is the first; and at Law you could not have been secure unless you had made a new Claim within the first Year and Day, and so on.

The

The Year and Day is in many Cases the Time limited by Law, as Non-claim for that Time after a Fine did at Law bar all Parties, as such Non-claim after final Judgment in a Writ of Right still does; so a Villein fled to ancient Demefn, and not claim'd by the Lord in a Year and Day, can't afterwards be seisd by him: If a Man wounded die not within a Year and Day, it is no Felony: No Execution can be sued after the Year and Day in Real or Personal Actions without a *Scire Facias*.

If the Ten'ton whom such Claim is made be seisd in Tail, immediately after such Claim he becomes seisd in Fee, for his Occupation after it is a Dis's'in: And the Dis's'ee is often as his Dis's'or continues his Occupation after Claim made, so often may bring Trespass: He shall recover Damages for the first Entry without any Regress, but after Regress he shall in Trespass with a *Continuando*, recover Damages for all the mean Occupation. 356. b.

Or he that makes such Claim may have an Action on the 5 R. 2. 7. and suppose that his Adversary entred where his Entry was not given him by Law, and in such Action he shall recover Damages and Costs for the first Entry, but not for the mean Profits, tho' he made Regress. And if his Adversary occupied the Tenements with Force and Arms, or with a Multitude of People when he claim'd, he may have a Writ of forcible Entry, and recover treble Damages. 257.

One may commit a Force, three or more Riot, Rout, or unlawful Assembly; how

many make a Multitude is not determin'd but it is left to the Judges Discretion.

This Writ of forcible Entry is grounded on the 8 *H.* 6. 9. and recovers treble Damages and Costs as well for the mean Occupation as the first Entry; it lies for an Entry by Force, or peaceful Entry and forcible Detainer, or forcible Entry and forcible Detainer: But there must be actual Force, and not such as the Law implies in every Trespass, Rescous and Disturbance. Unusual Weapons, or unusual Number of Servants, Threats or Violence, make Force. All that go to make a forcible Entry are guilty, tho' one only use the Violence.

258.

Continual Claim made by a Servant for his Master is good, if he enter into a Part and claim, &c. or if the Master say that he dares not go to any Part of the Land nor approach nearer than to *D.* and command his Servant to go to *D.* and claim and the Servant do so, this is sufficient tho' the Servant had no Fear, for he doth as much as he was commanded to do, and all that his Master durst or ought by the Law to do.

But if the Master be in Health, and command his Servant to go to the Land and claim, &c. in this Case a Claim made by the Servant as near as he dares is void, for he does not do all that is commanded, nor as much as the Master durst have done.

But if the Master be sick, or a Recluse so that by Reason of his Order he can't go and he command his Servant to go and claim for him, and the Servant go as near

as he dares by Reason of Fear, &c. this is sufficient tho' the Command were to go to the Land; and yet regularly, when a Servant does less than the Command, his Act is void; for *where a Man is forced to make use of a Servant, he is more favoured than one who is able to do his own Business*; and if the Servant do as much as it may be presumed his Master would have done himself it is sufficient, for *impotentia excusat Legem*; when a Servant exceeds his Master's Command, it is void only so far as he hath exceeded.

A Recluse, who by Reason of his Order cannot go out of his House, shall always appear by Attorney in such Cases where others must appear in proper Person.

If a Man imprison'd be disseised, and a Descend cast while he is in Prison, yet may he enter; for by Intendment of Law one in Prison is kept so close that he has no intelligence of Things done abroad, but if he were at large when disseised, a Descend during his Imprisonment binds him.

Also if one in Prison, against his own Consent, without Covin, be outlaw'd, he shall reverse it by Writ of Error; but being Matter of Fact, he can't by Reason of it avoid the Outlawry by Plea, unless in Case of Felony, for there *in favorem vite* he may plead it; and when the Defendant comes in on the *Capias utlagatum*, &c. he may by Plea reverse the same for Matters apparent, as in Respect of a *Supersedeas*, Omission of Process, &c. But *quare* if this can be done in another Term.

Q 5

Also

Also if one in Prison lose his Lands by Default in a real Action, he shall avoid it by a Writ of Error; but he can't have a Writ of Deceit; because the Summons was lawful.

260.

Records are legally the Memorials of Courts of Record, which hold Plea of Actions *vi & armis*, or where the Debt or Damages amount to 40*s.* or more, and proceed according to Common Law; and such Courts are created by Parliament, Letters Patents, or Prescription; but the Rolls of other Courts proceeding by other Laws are not Records. There can be no Averment, Plea or Proof against a Record; and if it be alledged and denied, it shall be tried by it self only. The Record is in the Judge's Breast during the Term, and alterable; but after the Term, it is in the Roll, and admits no Alteration, Averment, or Proof to the contrary. *Null tiel* Record cannot be pleaded to Letters Patents pleaded and shew'd forth, *Non concessit* may.

One in Prison may on Motion be brought to the Bar, and either must answer according to Law, or else, the same being recorded, the Law shall proceed against him.

261.

If one out of the Realm be disseised, and a Descent cast, yet his Entry is not barr'd, whether he were in the K.'s Service or not: But if he were disseised before he went beyond Sea, his Entry is taken away by the Descent. Tho' *alium*

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are be not within the Jurisdiction of Common Law, yet the Sea of *England* is within the Realm of *England*. To be *infra quatuor Maria*, is by Construction to be within the Realm of *England* or its Dominions; yet a Man may in Truth be *infra quatuor Maria*, and yet out of the Realm of *England*.

It seems that one out of the Realm shall not by Writ of Error avoid a Recovery in *Præcipe*, because he may have a Writ of higher Nature; but he may avoid an Outlawry, for otherwise he would be without Remedy.

Matters done out of the Realm of *England* concerning War, Combat or Arms, shall be determined by Civil Law before the Constable and Marshal, and the Trial shall be by Witnesses or Combat.

In any Action if the Defendant alledge, that the Plaintiff is an Alien born in *France* out of *K.'s* Ligeance, the Plaintiff may reply, that he was born in *England* in such a place within the *K.'s* Ligeance; and hereupon the Jury shall be charged, and on Evidence that he was born in *France*, &c. they shall find that he was born out of the *K.'s* Ligeance: On Evidence that he was born in *England* or *Ireland*, &c. they shall find that he was born within the *K.'s* Ligeance. So if one plead in Avoidance of a Fine that he was out of the Realm, &c. at the Time the adverse Party may alledge that he was in *England* at such a place, and thereon Issue shall be joined, and

Supra, 182.

and then on Evidence he may prove that he was out of the Realm, &c. which the Jury ought to find. And in such Cases in a special Verdict the Jury may find that he was born beyond Sea, or was beyond Sea at the Time, &c.

Adhering to the *K.*'s Enemies without the Realm, was Treason before the 25 *E.* 3. and triable in *England*, but the Adherency must of Necessity be alledg'd in some Part of *England*. Now by 32 *H.* 8. 2. Treason out of the Realm shall be enquired of, tried, and determined in the *K.*'s Bench, or before Commissioners in such County as the *K.* shall appoint, in such Manner as if it had been done in the same County where it is enquired of.

In an Action of Covenant on a Charter-party made at *Thetford* in *Norfolk*, or any other Part of *England*, if an Issue be taken concerning the Performance of a Matter covenanted to be done beyond Sea, it shall be tried at *Thetford*, &c. where the Action is brought, because the Contract took its Original there by making of the Charter-party; but generally where the Contract and the Performance thereof are to be both out of the Realm, it can't be tried at Common Law, except in Case of a Bond, which (being of a particular Nature, taking its Course, and binding according to the Common Law) tho' it bear Date in a Foreign Country, as in *Bourdeaux* in *France*, may be tried here; but (because the Venire for a Jury must be from some certain

6 Co. 47. b.
Hob. 11.

certain Place) it must of Necessity be laid in some Place of *England*, as in *quodam loco vocato Bourdeaux in France*, in *Islington in Comitatu Middlesex*; nor is it traversable whether there is such a Place in *Islington*. Cro.Jac.76.

One out of the Realm never could be barr'd by Non-claim on a Fine.

A Feme Covert, and he in Rev'n or Rem'r on a State of Freehold were barred at Law by the Non-claim of the Husband, or of the particular Ten't within the Year and Day after a Fine levied: To prevent which Mischief the 34 *E. 3. 16.* was made, which ordain'd that Non-claim on a Fine should be no Bar; and a Feme Covert and he in Rev'n or Rem'r are expressly provided for by 4 *H. 7. 24.* which makes a Fine levied with Proclamations a Bar to all not claiming within five Years; but if a Fine be levied without Proclamations, the said Statute of Non-claim still extends to it; and Non-claim within a Year and Day after final Judgment in a Writ of Right, is still a Bar to all, for the said Statute of Non-claim does not extend to it.

If a Dis'see bring an Affise, and the Jury find for him, and the Justices will be advised till next Affise, and in the mean Time Dis'sor die, it seems that the Entry of the Dis'see is not taken away, for the Suit did amount to a Continual Claim: So if Ten't in Dower alien with Warranty, and the Heir bring a Writ of *Casu proviso*, and hanging the Plea, the Ten't die, yet shall not the Heir

262.

263.

Heir be barr'd or rebutted by the Warranty, for the *Præcipe* amounted to a Continual Claim.

An Appeal or Affise are said to be arraign'd, when they are set in such Order that the Defendant is inforc'd to answer thereunto; and they are arraign'd in *French*, but enter'd in *Latin*; but no Man is said to be arraign'd, but at *K.*'s Suit.

If an Abbot, or Mayor of a Corporation, or Parson die, and before there be a Successor a Stranger enter into the Lands, &c. and a Descent be cast, yet the Successor may enter; for tho' the Stranger by Entry and Claim to him and his Heirs did gain the Fee, yet inasmuch as the Act of God was the Cause that no claim could be made, it shall not prejudice the Successor: And for the same Cause the Successor may present, notwithstanding an Usurpation of a Church in Time of Vacation.

264.

A Grant made to or by a Body Politick during the Vacation of the Headship is void, nor can they sue till they have a Head; but if a Lease *L.* be made, Rem'r to the Mayor and Commonalty of *B.* there being no Mayor at the Time, 'tis good, if a Mayor be chosen during the particular State.

Of Releases.

Releases of all the Right which one has in Land, are commonly made in such Form, *Noverint universi per Præsentes me A. de B. remisisse, relaxasse, & omnino de me & heredibus meis quietum clamasse;*
vel

vel sic, *pro me & hæredibus meis quietum clamasse C. de D. totum jus, titulum, & nameum quæ habui, habeo, vel quovismodo in futurum habere potero, de & in uno Messuagio cum pertinentiis in F. &c. Note, The said three Words remississe, relaxasse, & quietum clamasse, are of the same Effect; and there be other Words of Release, as renunciare, acquietare; so if a Lessor grant to his Lessee that he shall be discharged of the Rent, this is a good Release.*

Releases are either express, which must be by Deed; or implied, which may be with or without Deed. As if the Lord disseise the Ten't, and make a Feoffment in Fee, or Dis'see disseise Dis'sor's Heir, and make a Feoffment in Fee: This is a Release in Law of the Seigniorie in the first Case, and both of the Right and Action of the Dis'see in the second.

If the Obligor make the Obligee Executor, *who accepts thereof*, this in Law releases the Action; but the Duty remains, for which he may retain, &c.

If there be two Feme Obligees, and one of 'em marry the Obligor, or if an Infant at 17 make his Debtor Executor, this is in Law a Release; *for as the Law gives him Power to make an Executor; it gives his Executor the same Advantages with others.* But if a Feme Executrix marry a Debtor, this is no Release, for if it should be one, it would be a *Devastavit*, which an Act in Law never works.

If a Dis'see release to his Dis'sor's Lessee

I

L. his

L. his Right is gone for ever; but if he disseise his Dis'sor's Heir, and make a Lease *L.* his Right is releas'd but during Lessee's *L.* for a Release in Law is more favourably taken according to the Parties Intent, than an exprefs Release in Deed.

265.

The Word *Right* in its general Signification includes a Title, for which there is no Remedy by Action but by Entry only.

Those Words in Releases, *quæ quovis modo in futurum habere poterò*, are void, for a mere Possibility can't be releas'd, therefore if the Son should make such a Release to his Father's Dis'sor in the Father's Life, yet might he enter after his Death, unless there were a Clause of Warranty in the Release. If Father disseise Grandfather, make a Feoffment, and Father and Grandfather die, the Son may enter, but if there were a Clause of Warranty he should have been barr'd.

A Right to a Rev'n or Rem'r may be presently released, for one may have a present Right to them, tho' it can't take Effect in Possession, but *in futuro*. Husband makes a Lease *L.* and dies, the Wife may release her Right of Dower to him in Rev'n, (*because she can't recover her Dower against the Lessee L. without binding his Rev'n*) yet she has no present Cause of Action against him.

A bare Authority can't be released, therefore the Executors to whom one devises that they shall sell his Land can't release to the Heir; so if *cestuyque* Use had devised that his Feoffees should sell the Land, and

if he had made a Feoffment over, yet
 might they have sold the Use.

But tho' these Powers in Strangers can't be
 released, yet a Power of Revocation in the
 Feoffor, &c. may.

Vid. *supra*,
 325.

If the Plaintiff release all Demands to the
 Bail in the *King's-Bench* and afterwards
 Judgment be given against the Principal,
 Execution may be sued against the Bail; for
 in the *K.'s-Bench* when the Proceeding is
 by Bill, the Bail are not bound in a certain
 Sum to the Plaintiff, but only undertake
 that the Defendant shall pay the Condemna-
 tion Money, or render his Body to Prison,
 so that they are but in Nature of Jailors to
 the Defendant; but in the Common-Pleas
 the Bail are bound to the Plaintiff in a
 certain Sum: So if the Conusee of a Sta-
 tute release to the Conusor all his Right to
 the Land, yet may he sue Execution, for
 he has no Right to the Land, but only a
 Possibility.

Regularly none can take a Release of a
 bare Right to Lands unless he have a Free-
 hold in Deed, or in Law, or a Rev'n or
 Rem'r in Fee, Tail, or for *L.* vested in him
 at the Time of the Release; yet it is not
 necessary that such Rem'r or Rev'n be im-
 mediately expectant on the Estate in Posses-
 sion; but if the particular Ten't be dis-
 seised, a Release to them in Rev'n or Rem'r
 during the Possession of the Dis'sor, is void.

267. *a.*

The Vouchee having enter'd into the War-
 ranty, and the Ten't to a *Præcipe*, notwith-
 standing he has alien'd, may take a Release
 from the Demandant, for they are Ten'ts in
Law

266.

Law as to him, and it is presumed that they are as much concerned to answer his Action as if they were Ten'ts indeed. An Annuity payable by the Parson, may in Vacation be released to the Patron, for he is the only Person, who by the Temporal Law has the Interest in the Church: But it seems that a Release to the Ordinary only is not good because it is a Temporal Thing. One Lessee T. may take a Release of another, as if such Lessee be ousted, and Lessor disseised, and Dis'sor make a Lease T. the first Lessee may release to the second: But a Dis'see cannot release to his Dis'sor's Lessee T. but to his Lessee L. he may. A Feme may release her Right of Dower to Guardian in Chivalry, because a Writ of Dower lies against him, and the Heir shall take Advantage of it.

There is *jus Proprietatis*, and *jus Possessionis*, and he that has both is said to have *jus Duplicatum*, or *droit droit*; the Dis'see has the 1st, the Dis'sor the 2d, and if Dis'see release to him, he has both. Regularly when a bare Right is released to one that has *jus Possessionis*, and afterwards another by a mean Title recovers the Land from the Releasee, the Right of Possession draws the naked Right with it, and leaves no Right in the Releasee; as if A. disseise the Dis'sor's Heir, and the Dis'see release to A. and then the Dis'sor's Heir enter upon A. or if Dis'see disseise the Dis'sor's Heir, and make a Feoffment, and then the Dis'sor's Heir enter upon the Feoffee; in both Cases the mere Right is, together with the Possession vested in the Heir of the Dis'sor, who by his Entry wholly defeats the Estates

the Releasee, or Feoffee; for if the naked Right should remain in them, it would be against a known Maxim of Law which will not suffer a Chose in Action, (*in any except the K.*) or a bare Right to be transferred to a Stranger by any Act of the Parties whatsoever.

Dyer 1 p. 7,
30. p. 208.

But if Donee in T. discontinue, and Do-
or release to the Discontinuee, and Donee
re, and the Issue recover, the Rev'n re-
mains in the Discontinuee; for the Issue can
recover but the Estate T. and the Donor in
his Case, like the Dis'see in the former,
shall not have again what he wholly parted
with by his Release,

If Dis'see disseise Dis'sor's Heir, or if a
stranger having Right of Dower disseise the
Heir, and he re-enter, yet their former Right
remains: So if one disseise Dis'sor's Heir,
and infeoff the Dis'see's Heir apparent of
all Age, and Dis'see die, and then the Dis-
s'or's Heir enter, &c, yet the ancient Right
of the Heir of the Dis'see, &c. remains,
or in all these Cases the Right is vested in
the Parties by Act of Law.

If a Dis'see release to the Dis'sor of his
Dis'sor's Heir on Condition, and it be bro-
ken; or if he disseise him, and make a
Feoffment on Condition, and enter for a
Breach, and then the Heir enter, the Dis-
s'ee's Right remain in him; but if the Heir
had enter'd before the Condition broken
the Dis'see's Right had been gone for ever;
for the Heir of the Dis'sor is not subject to
the Condition, because he claims not under the
Conveyance to which it is annex'd; but by
re-

recontinuing his Possession wholly defeats all Conveyances made since he was disseis'd.

(a) Moo.
Fol. 141.

The Dis'sor's Heir has the Freehold in Law in him before he enters, and a Fine *sur Conusance de droit come ceo*, or *sur Conusance de droit tantum*, Surrender by Ten't L. to him in Rev'n, Bargain and Sale by Deed indented and enroll'd, Covenant to stand seis'd pass a Freehold in Law before Entry (a) but a Common Recovery vests the Freehold in Deed or in Law, before Entry or Execution sued.

If the Ten't in a *Præcipe* seis'd in Fee confesses himself no be a Villein to A. and to hold the Land in Villenage of him, by this A. is actually seis'd without Entry, for the Possession of his Villein is thereby become his Possession.

The Estate which makes a Man Ten't to the *Præcipe*, is said to be the Freehold not the Rev'n &c.

267. b.

The Release made to the Freeholder shall aid him in Rev'n or Rem'r, and the Release made to him in Rev'n or Rem'r shall aid the particular Ten't, as much as if it were made to them, but it shall not be pleaded by them being Privies in Estate, unless they shew it.

If two Ten'ts in Common, or several Ten'ts grant a Rent of 40 s. out of their Land, and after the Grantee release to one of 'em, this extinguishes but 20 s. but if Lessor L. and Lessee grant a Rent in Fee and the Grantee release to one of 'em, this extinguishes the whole, for it is but one

Rent

Rent issuing out of both their Estates, but
 in the other Case there are several Rents.
 If there be Lord and Ten't, and the Ten't
 disseis'd, and the Lord release to him all
 his Right in the Seigniorie or in the Land,
 this shall extinguish the Seigniorie, for the
 Lessee is Ten't to the Lord in Right and
 Law, for at Law, if the Dis'see's Beasts had
 been taken, and he had replevy'd them, he
 might have compell'd the Lord to have
 avow'd upon him, or upon the Matter
 shewn, have abated his Avowry, and his
 Heir of *Kt.* Service Land should be in Ward
 or pay Relief; if he die without Heir, the
 Land shall escheat. And notwithstanding
 the Lord accept Rent of the Dis'sor after
 the Title of Escheat accrued to him, yet it
 is said that he may have a Writ of Escheat,
because Rent may be paid by a Bailiff, but
 if he accept of Fealty *which must be done*
by the Ten't in Person, or avow for the
 Rent in a Court of Record, he shall be bar-
 red of his Escheat; and if the Dis'sor had
 made a Feoffment, or had died seis'd, and
 the Land had descended to his Heir, before
 the Dis'see had died without Heir, there
 had been no Escheat at all, because the Lord
 had a Ten't in by Title; and if the Dis'see
 die without Heir, and then the Dis'sor make
 a Feoffment or die seis'd, and the Land de-
 scend to his Heir, and the Lord accept the
 Rent of the Heir or Feoffee, he shall be bar-
 red of his Escheat, because they are in by
 Title.

A Release of a Rent-Charge to Dis'see is
 void, for there is no such Privy between
 the

the Dis'see and Grantee, as there is in the Case above, between the Lord and his Ten't being disseis'd, because the Land only is charg'd.

By 21 H. 8 19. the very Lord may avow as in Lands within his Fee, without naming any Person in certain: But he may still avow at Law if he will. And notwithstanding the Statute, all necessary Incidents must be observ'd, and therefore the Lord must alledge Seisin by the Hands of some Ten't in certain within 40 Years. And the Plaintiff shall have all the Advantages, that he had before, as Aid, &c. Disclaimer only excepted: For he can't disclaim to hold of the Lord, because he avows on no Person in certain. Tho' the Words of the Act be, if the Lord distrein in the Land holden, yet if he come to distrein, and the Ten't drive the Beasts in the Lord's View out of the Land, and he distrein in other Land, yet it is within the Act.

Vid. supra.
247.

If Donee or Lessee *L.* be disseis'd, a Release by the Donor or Lessor is good to extinguish the Rent, which still continues between 'em, in Respect whereof the Donor or Lessor must still avow on the Donee or Lessee for the Rent behind, but nothing of the Rev'n passes, for the Release can't enlarge the Right of the particular Ten't, who at the Time has no Estate in the Land.

So if Donee discontinue, and then the Donor release to the Donee, he passes nothing of the Rev'n, but yet he extinguishes the Rent, for the Donor must avow on the Donee still, for if he should avow on the

Discontinuee,

discontinuee, the Rev'n would by his own
 avow appear to be out of him.

If there be very Lord and very Ten't, *i. e.*
 the Lord have a Fee in the Seigniorie, and
 the Ten't in the Tenancy, and the Ten't
 make a Feoffment, and the Lord release to
 the Feoffor before he has accepted the Feoffee
 of his Ten't, this Release extinguishes not
 the Seigniorie, for tho' the Lord may avow
 the Feoffor, yet he can't be compell'd to
 do it, nor is the Feoffor Ten't in Right to
 the Lord. And if the Feoffee give the Lord
 notice, and tender all the Arrers, he shall
 compel him to avow upon him if he avow
 any one in certain; he shall also compel
 the Lord to avow upon him after the Feof-
 for's Death, for the Lord can't avow on the
 heir of the Feoffor, because nothing de-
 ended to him, and there never was *any*
continuity between him and the Lord. But if
 the Lord accept the Rent of the Feoffee be-
 fore the Law compels him, he loses all the
 arrears due in the Time of the Feoffor, for
 after he shall not avow on the Feoffor, nor
 on the Feoffee, for the Feoffor's Arrerages,
 it may *presum'd that he would not have*
discharged the Feoffor, unless he paid him all
the Arrers. But if he accept the Rent of
 the Feoffee due in his Time, after the Feof-
 for's Death, or of Ten't that has forejudg'd
 Mesne, he shall not lose the Arrers due
 in the Time of his former Ten't, for the
 Law compell'd him then to accept 'em for
 his Ten'ts.

A Writ of Customs and Services lies not
 against a Feoffor, because he is not Ten't in
 Right.

F. N. B. 10.
G.

Right to the Lord, and if *the Lord distrain for Rent*, and a Rescous be made, an Affise lies not against the Feoffor and the Rescuer, for the Feoffee is Ten't, and the Distress was taken, and the Violence done to the Lord on Land in his Possession, and an Affise for Rent is not so merely Possessory as an Avowry is, for if the Lord has been seis'd of more Rent than of Right is due by Incroachment on the Ten't, he can't recover in Affise more than is due, but in Avowry he may. But the Lord's Release to the Feoffor discharges all the Arrerages due from him before the Feoffment, for so far as the Feoffor is liable to the Lord's Avowry, so far may he take a Release from him, but such Release can't extinguish the Seigniori, as is aforesaid, for which Cause the Feoffee can take no Benefit thereof, any further than as to the Discharge of the Arrerages during the Feoffor's Time, but the Feoffor may plead to the Lord's Avowry, a Release to the Feoffee, for thereby the Seigniori, which is the Ground of the Avowry, is extinct. So if a particular Ten't after Waste done grant over his Estate, and he in Rev'n release to the Grantee, the Grantor may plead it in an Action of Waste against him, for if he in Rev'n should have Judgment against him, he would recover the Place wasted against the Releasee. So the Vouchee, or a Ten't to a *Præcipe* after a Feoffment made, or an Abbot, &c. having alien'd contra formam collationis, may plead a Release to the Ten't of the Land, for the Demandant can't recover against them without avoiding such Release.

There

There be four Kinds of Avowries for Services. 1. *Super Verum Tenentem*, when both Lord and Ten't have Fee. 2. *Super Verum Tenentem in forma prædicta*, when a Lease or Gift in *T.* is made, Rem'r in Fee. 3. Upon one as his Ten't by the Manner omitting *Verie*, as when the Lord has a particular Estate in the Seigniorie, and such Avowry shall be made by Donor or Lessor upon Donee or Lessee. 4. *Sur le Matter en Terre*, as within his Fee, and Seigniorie when Ten't by *Kt.*'s Service made a Lease *L.* and left an Heir in Ward, the Lord should so avow upon the Lessee.

A Release by a Lessor to his Lessee *T.* or *W.* having enter'd by Force of such Lease, is good, in Respect of the Privy between them, for it would be in vain for the Lessor to make Livery of Seisin to one already in possession of the same Land by his own Lease; and if the Lessee *T.* make an Underlease for Years, yet may the Lessor release to the First, but not to the 2d Lessee, and if one make a Lease *T.* Rem'r for Years, and Lessor release to him in Rem'r, after the first Lessee has entered, such Release is good to enlarge his Estate.

But a Release to Lessee *T.* in *Futuro*, or any Lessee *T.* Before Entry, tho' it may extinguish the Rent reserv'd, (*which is a Charge upon the Interest into whose Hand soever it comes,*) yet it can't enure by Way of Enlarging an Estate, because the Lessee has no possession; yet he has such an Interest as is grantable over.

R

And

2 Vent. 35.

And since the Statute of Uses a Release to a Bargainee for a Year, &c. is good because the Statute executes the Possession to the Use, and if there be any Reservation on a Lease. Y. tho' but of a Pepper-Corn, it is a sufficient Consideration to raise an Use, and consequently to make the Lessee capable of a Release.

If a next avoidance be granted to two, one may release to the other before the Church becomes void, not after, because it is then as a Chose in Action.

If one make a Lease *L. Rem'r L.* and Lessee die, a Release to him in *Rem'r* before Entry is good, for he has a Freehold in Law.

The Lessor's Release to a Ten't by Suffrance is void, for he has a Possession without a Privity. But if one enter of his own Wrong, and take the Profits, his Words to hold at the Owner's Will cannot qualify the Wrong, for he is *Dis'sor*, and the Owner's Release to him is good; if the Owner consented, he is Ten't, and then the Release is also good. Note *That tho' it be generally true, that he who enters wrongfully and takes the Profits is a Dis'sor, yet this is to be understood where there is no particular Estate in the Land, but if there be a Term in Esse, and one enter claiming the Term, and pay the Rent, &c. he shall not be a Dis'sor, but an Action of Debt or Waste shall lie against him, and on may be an Executor of his own Wrong of a Term.*

3 Lev. 35:

The

There are four Kinds of Privies. 1. In Estate, as the particular Ten't, and he in Rev'n or Rem'r. 2. In Blood, as Heir to the Ancestor, 3. By Representation, as Executor to the Testator. 4. In Tenure, as Lord and Ten't.

Before 27 H. 8. 10. if a Man had made a Feoffment to the Use of his Will, and afterwards the Feoffee had releas'd to the Feoffor and his Heirs, this Release was good; for in such Case the Law intends that the Feoffor ought presently to occupy the Land at the Will of the Feoffees, and so the Law makes a Privy between them. And the Feoffor should be sworn on a Jury by Common Law; and where 2 H. 5. 5. required 40 s. *per Annum* in a Juror, it was holden that *Cestuyque* Use of Land to that Value might be returned; as to a Feoffment to the Use of a Will. *Vide supra*, 166.

An Use is a Trust or Confidence repos'd in some other, which is not issuing out of Land, but as a Thing collateral, annex'd in Privy to the Estate of the Land, and to the Person touching the Land, *viz.* that *Cestuyque* Use shall take the Profits, and the Ter-tenant shall make an Estate according to his Direction; so that *Cestuyque* Use has neither *jus in re*, nor *ad rem*, nor any Remedy but in a Court of Equity.

An Use is either rais'd by Transmutation of the Estate, as by Fine, Feoffment, &c. or out of the Estate of the Owner of the Land, as by Bargain and Sale, Covenant to Stand seis'd, &c. A Feoffee to the Use of A. and his Heirs before 27 H. 8. bargains and

sells to C. without giving Notice of the Use nothing passes, because he was seisd to the Use of B. before, which Use can't be altered or extinguished without Transmutation of the Possession, and there can't be two Uses of the same Land *in Esse* at the same Time. If A. disseises one to B.'s Use, B. not knowing thereof, and bargains and sells to C. C. has an Use executed by the Statute, which shall not be divested by B.'s agreeing afterwards to the Diss'in, for tho' an Agreement subsequent be look'd upon as equivalent to a Command precedent, yet the Law will not by such a Fiction take from C. an Use for good Consideration settled in him.

Releases either enure, 1. By Way of enlarging an Estate; or, 2^{dly}. By Way of Mitter le Estate; or 3^{dly}. By Way of Mitter le Droit; or, 4^{thly}. By Way of Extinguishment.

273. As to the first, It is necessary that the Parties to them be privy in Estate, therefore if a Donee or Lessee make an Under-lease, a Release by the Donor or first Lessor to the second Lessee is void, but a Lessor L. or T. may release to the Husband of his Lessee and his Heirs, &c. And if one make a Lease T. Rem'r L. and then release to the Lessee T. and his Heirs, he thereby enlarges his Estate in Fee.

If a Lessor T. release to his Lessee, or to a Ten't by Execution, all his Rights without saying any more, the Lessee has an Estate L. if he release to him and his Heirs, he has a Fee, &c. for such Release

A Release is in this Respect like Livery of Seisin, which being made without Words of Inheritance, gives but a State *L.* If a Lessor release to his Lessee *pur autre Vie*, he gives him an Estate for his own life.

If one make a Lease for 10 Years, Rem'r for 20 Years, and he in Rem'r release to the first Lessee, the Releasee shall have 30 Years, for his Term of 10 Years shall not be drown'd, because a Chattel can't be drown'd in a Chattel.

If I grant the Rev'n of my Ten't *L.* to another for *L.* I can't have Waste; but if I after Release to my Grantee and his Heirs, he shall have Waste for Waste done after each Grant of the Inheritance to him.

But where a Release enlarges an Estate, the Releasee must not only be Privy, but must also have an Estate; therefore if an Infant's Lessee *L.* grant over his Estate, and the Infant at full Age bring a *Dum fuit infra statem* against the Grantee, who vouches the Grantor, a Release by the Demandant to the Grantor and his Heirs, is void as to enlarge his Estate, *for it is manifest that the Release can't enlarge the Estate of him that has no Estate.*

2. Releases that enure by Way of Mitter Estate must be also between Privies, *viz.* Parceners or Jointenants, but such a Release does not require any Words of Inheritance, whether it make a Degree, as when it is made by one Parcener to another, or one Jointenant to one of his Companions, or

whether it make no Degree, as when it is made by one Jointenant to all the rest.

If there be two Parceners of a Rent, and one of them marry the Ter-tenant, and the other Release to her, this shall enure by Way of *Mitter le Estate*, and yet the Rent was suspended at the Time of the Release; but if she had releas'd to the Husband, it would have enured by Way of Extinguishment. *Quære*, how a Release to both Husband and Wife shall enure.

3. Some Releases enure by Way of *Mitter le Droit*, which transfer the Right of the Releasor to the Releasee, as when Dissee releases to Dissee, which makes his Estate rightful which was wrongful before.

Such a Release may be on Condition; but a Condition can't be releas'd on Condition; nor can a Villein be manumitted, on a Grant attorn'd to on Condition subsequent, but a Condition precedent is good in both Cases, *for there is no Attornment or Manumission before it is perform'd.*

K. may make a Denizen, or grant a Pardon on Condition either precedent or subsequent.

274. A Release of a bare Right for a Day, or an Hour, &c. is as good as if it were made to the other and his Heirs, &c. for a Dissee cannot release Part of his Estate in the Right, *because he has no Right to any Estate but that whereof he was disseised, therefore he must release his Right to that or none at all.*

Neither

Neither is it requisite that there be any Privy between the Parties to such Release, as when Lessee *L.* makes a Lease *L.* Rem'r in Fee, and the first Lessor releases to the said Lessee, this absolutely bars the Releasor, and the Rem'r Man shall take Benefit of it; and if a Dis'sor make a Lease *L.* Rem'r in Fee, or a Lease *L.* only, and the Dis'see release to the Lessee *L.* it shall enure to the Benefit of him in Rem'r or Rev'n, and such Releases are said to enure partly by Way of *Mitter le droit*, and partly by Way of Extinguishment.

But he in Rev'n or Rem'r shall take no Benefit of a Release of all Actions to Lessee *L.*

Neither is Privy requisite in Releases which enure by *Mitter le Droit* only which are said to enure by Way of Entry and Feoffment, as if one be ousted by two Dis'sors, Abators, or Intruders, and release to one of them, or if a Donee in *T.* or Lessee *L.* be disseis'd by two, and afterwards he and the Reversioner release to one of them, the Releasee shall hold the other out in such Manner as if the Dis'see, &c. had entered and infeoff'd him: But if Lessee alone make a Release to one of them, it shall enure to them both, for if it should enure by way of Entry and Feoffment, the Releasee's Fee-Simple would be chang'd to a Fee qualified in the first Case, and an Estate *L.* in the second, and the Rev'n would be revested in the Donor or Lessor, who were Strangers to the Release, which

strange Transmutation of Estates the Law will not suffer.

But if *K.*'s Lessee *L.* be disseised by two and release to one of them, the Releasee shall hold the other out, for the Dis'sor gain'd but a State for Life. So if two Jointenants make a Lease *L.* and after disseise the Lessee who releases to one, he shall hold the other out, because the Dis's'in was but of a State *L.* and the Release enuring by Way of Entry and Feoffment, does not diminish the Estate of the Releasee, nor re-vest an Estate in any not concerned therein but only divests the Estate which the other Jointenant gain'd by Dis's'in.

If Lessee *Y.* be ousted, and Lessor disseised, and Lessee release, the Dis's'ee may enter, but if Lessee *L.* be disseised and release to the Dis's'or, the Lessor can't enter for the Dis's'or has a Freehold whereon the Release of Lessee *L.* may enure, but he has no Term for *Y.* &c. And it is plain in the first Case that the Lessor might recover in Assise before the Release, tho' he could not take the Profits, and after the Release he may both recover and take the Profits for the Estate gained by the Dis's'in being wholly defeated, if the Dis's'or should maintain an Action against him for the Profits, it must be grounded in the Release of the bare and naked Right of the Lessee *Y.* which can't be transferred, but in the 2d Case Lessor can't have an Assise during the Life of Lessee *L.*

If two Jointenants be disseised by two, and one of them release to one of the Dis'sors he shall not hold out his Companion, for if this should enure by Way of Entry and Feoffment, it would not only defeat the Estate of the other Dis'sor, but re-est the Estate in the other Dis'see who was Stranger to the Release.

Two Femes disseise a Man, and one of them marries, and the Dis'see releases to the Husband, this enures to the Advantage of both Dis'sors, for the Husband is in a Manner in by Title, and it would be a hard Construction to make such a Release enure to oust his Wife, in Right of whose Estate alone he was enabled to take the Release, but if two Women be Dis'sors, and one take Husband, and Dis'see release to the other, she becomes sole seised. Co. L. 278
a.

If two Dis'sors make a Lease L. or T. a Release to one of them enures to both, or if it should enure by Way of Entry and Feoffment, the Releasee would avoid his own Lease. Mortgagee on Condition after Condition broken is disseised by two, and Mortgagor releases to one of them, this enures to both, for they did no Wrong to the Mortgagor, and he releases not a Right to an ancient Estate devested by Wrong, but a Title of Re-entry by Force of Condition which shall not by Construction of Law defeat the Estate to which it was annexed without an express Re-entry, according to the Words of the Condition.

A Release to one joint Feoffee enures to him and all his Companions in Respect of the Warranty which the Law presumes that they have, *and which, if the Release should enure by Way of Entry and Feoffment, would be defeated, the Estate being defeated to which it was annexed.*

Vid. Co. L.
42. b.

If he in Rem'r *L.* disseise Ten't *L.* and then Ten't *L.* die, the Dis's'in is purged, and he becomes Ten't *L.* for the Law more respects a lesser Estate by Right, than a larger Estate by Wrong.

If Dis's'ee, or he whose Rev'n or Rem'r is devested by a Forfeiture, release to the Ten't of the Land whether he be in by Feoffment or Dis's'in, such Release, if the Releasor had Right of Entry defeats all mesne Titles, because it enures by Way of Entry and Feoffment. Therefore if *B.* Dis's'or infeoff *C.* with Warranty, who infeoffs *D.* with Warranty, who is disseised by *E.* *B.*'s Release to *E.* defeats all the mean Estates and Warranties, for it is made to a Dis's'or, *who comes not to the Land in Privity of the Estate to which the Warranty was annexed, and all the Right of C. and D. to the said Estate being wholly defeated by the Release of B. their Re-entry can't recontinue their former Possession, but they must be Dis's'ors anew.*

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So if a Dis's'or's Lessee *L.* alien in Fee and then the Dis's'ee release to the Alienee the Dis's'or can't enter for the Forfeiture. And if a Dis's'or die seised, the Dis's'ee being within Age, and a Stranger abate and

Dis's'ee

Dis'see being of full Age release to the Abator, the Heir of the Dis'sor shall never enter.

But if Lessee *L.* be disseised, and the Dis'sor be disseised, and he in Rev'n release to the 2d Dis'sor, the first may enter on him, and if Lessee enter, he leaves the Rev'n in the first Dis'sor; for the Entry of him in Rev'n was not lawful, and consequently his Release cannot enure by Way of Entry and Feoffment, therefore the Estate of the Releasee being defeated by a mean Title, the Right of Possession draws the naked Right along with it.

Vid. *supra*,
354.

Notwithstanding a Release by one whose Entry is lawful enures to many Purposes by Way of Entry and Feoffment, and therefore if a Disseisor's Feoffee on Condition make a Feoffment, without expressing any Condition, or if a joint Dis'sor grant a Rent, and the Dis'see release to the 2d Feoffee, or the other joint Dis'sor, the Condition or Rent are avoided, because the first was not expressed on the Feoffment, and the 2d was not granted by the Releasee. And such a Release takes away all wrongful Titles, as if *A.* disseise *B.* to *C.*'s Use, and *B.* release to *A.* this takes away *C.*'s Agreement to the Dis'sin. Yet if a Dis'sor make a Feoffment on Condition, and Dis'see release to the Feoffee; or if he grant a Rent, and then Dis'see release to him; such Condition or Rent remains, for one shall not avoid them against his own express Acceptance or Grant by Force of such a Release, (and yet if the Dis'see had entered

Vid. *supra*,
363.
278.

entered, and made a Feoffment to him they had been avoided.) If two Dis's'ors make a Feoffment, and take back an Estate *L.* or *T.* a Release to one enures to both, or if two Dis's'ors be disseised, and released to their Dis's'or, and then disseise him, and Dis's'ee release to one or both, yet the Dis's'or may enter, for the Law will not make such a Construction of such a Release, as to enable a Man thereby to avoid his own *Feoffment* or Release, and if the Heir of a Dis's'or endow his Wife, *ex assensu Patris*, and then the Dis's'ee release to the Dis's'or, he shall not avoid the Endowment.

Neither shall Acts done to the Dis's'or be avoided by the Release of the Dis's'ee, as if the Lord confirm his Estate to hold by lesser Services, or if Estovers be granted to him to be burnt in his House, or a Warranty be made to him, they shall not be lost by such Release.

An Alien disseises *J. S.* and is made a Denizen, and then *J. S.* releases to him, *K.* shall not have the Land, for it is as if it were a new Purchase, but if the Alien had been a Feoffee, *K.* should have the Land, for it is intended that the Feoffee has a Warranty, by Force of which he may preserve his Estate or recover in Value if he lose it, which I suppose *K.* may take Advantage of, as being annexed to the Estate, (tho' he can't claim a (a) mere Right of a real Action as forfeited to him,) and *K.* shall not lose his Possibility by such a Release, but the Dis's'or is merely in by Wrong.

(a) 3 Rep 2
b.

The

The Lord disseises his Ten't, and is disseised, and the Dis'see releases to the 2d Dis'sor, the Seigniorie is not revived, for the Dis'sor claims under the Lord *the same Estate, which* was in the Lord, and the Possession was never actually removed; and the Law is the same if the Lord had been disseised by two, and the Dis'see had released to one of them. But if the Lord and a Stranger disseise the Tenant, and the Tenant release to the Stranger, the Seigniorie is revived, for the Stranger claims not under the Lord, and if the Stranger had survived the Lord, the Seigniorie would have been revived.

An Infant Dis'sor aliens in Fee, the Alienee dies seised, the Dis'see releases to the Heir of the Alienee, the Entry of the Infant is still lawful, yet if he bring a Writ of Right against the Heir of the Alienee, and the *Mise* be joined on the mere Right, the Heir ought to have a Verdict, for the Right of the Dis'see passed to him by the Release; and tho' a Release by him whose Entry is not lawful is said to enure by Way of Extinguishment, yet the Releasee may take Advantage of it, for if he be seised of the Land in Fee, the Whole passes to him, and if he be Ten't *L.* only, he shall have the Benefit of it during his Life, tho' the Whole pass not to him; but in all such Cases the Right of him, that made the Release, is wholly extinguished as to himself.

Tenant in *T.* with the Rem'r in Fee to *A.* dies without Issue, *B.* intrudes, *A.* reco-

vers

279.

vers in Formedon by Default, and makes Feoffment to C. B. reverses the Recovery in a Writ of Deceit, C. shall never have a Writ of Right, *for the Recovery being reversed all Estates subsequent to it are defeated, and B. is restored to the Land in such Plight as if there had been no Recovery at all, and the Feoffee cannot maintain an Action on the naked Right of his Feoffor.*

280.

4. Some Releases enure by Way of Extinguishment as to the Releasor only, and as to others by Way of *Mitter le droit*, as where one whose Entry is not lawful, releases to the Tenant, or a Dis'see releases to a Lessee L. or a joint Feoffee of a Dis'sor. But where the Releasee cannot have the Thing released, a Release shall enure by Way of Extinguishment against all Manner of Persons; as when the Lord releases his Seigniori to his Tenant of the Land, or when the Grantee of a Rent Charge or Common releases to the Tenant.

Such Releases absolutely extinguish the Rent, &c. tho' the Releasee be but Tenant for L. And they may be made to one whose Estate is suspended, as if a Feme Mesne marry her Tenant, and the Lord release to the Feme, the Seigniori is extinct; but if he release to the Husband, both the Seigniori and Mesnalty are extinct.

If the Lord release all his Right in the Seigniori, or all his Right in the Land, the Seigniori is extinct without any Words of Inheritance.

But the Lord may release his Seigniorie
T. or for *L.* or *T.* & sic de cæteris ; but a
 are Right cannot be so released, for if it
 released for an Hour it is gone for ever. Vid. supra;
366.

If the Tenancy be given to the Lord and
 Stranger, and the Heirs of the Stranger,
 the Lord releases all his Right to his Com-
 panion; this not only passes his Estate in
 the Tenancy, but also extinguishes his
 Right in the Seigniorie.

The Lord grants his Seigniorie for Years,
 the Tenant attorns, the Lord releases to
 the Grantee *T.* and to the Tenant of the
 Land generally, this extinguishes the
 Seigniorie, and the State of Grantee *T.* al-
 so, for as to the Tenant of the Land it e-
 nures by Way of Extinguishment of the
 Seigniorie, which requires no Words of
 Inheritance, but the Estate of the Gran-
 tee *T.* in the Seigniorie can be enlarged but
 for *L.* without apt Words of Inheritance,
 and therefore it shall be extinct, because
 there cannot remain a particular Estate in
 the Seigniorie, the Fee being extinct, 9 Rep. 134.
b.
the Seigniorie Paramount of an Estate in
Fee cannot issue out of and be supported by
a Mesnalty of a smaller Estate.

But if the Release had been to them, and
 their Heirs, it had given the Grantee a
 Fee in one Moiety, and extinguished the
 other.

Littleton proves that in the Case aforesaid
 the grand Assise ought to pass for the Heir
 of the Alienee, from the Case of him that
 had a Rem'r in Fee expectant on a State *L.*
 at Common Law, for before *Westm.* 2. 3. If
 Tenant

281.

Tenant *L.* had lost by Default in a feigned Action, and died, he in Rem'r had no Remedy, But if he had disseised Ten't *L.* before such Recovery, and then Ten't *L.* had re-entered, and lost by Default, he might have had a Writ of Right against the Recoverer, for tho' the Seisin which he gained was defeated by the Re-entry of the Tenant *L.* as to Ten't *L.* yet it was a good Ground of a Writ of Right against the Recoverer, who was a Stranger. And tho' the *Mise* be join'd in this Manner, whether the Tenant have more Right as he holds, than the Demandant in the Manner as he demands, and the Seisin of the Demandant were defeated, so that he has no Right in the Manner as he demands, yet he ought to recover, for these Words *modo & formâ* are mere Form, when the Issue is joined, on the Point of the Action, as in this Case, or when a Demandant in *Casu Proviso* counts of an Alienation in Fee, and the Tenant says, that he did not alien *Modo & Formâ*, &c. and the Jury finds an Alienation in Tail, for the Point of the Writ is whether the Tenant in Dowry aliened to the Disseisor of the Demandant.

But when the Issue is on a collateral Point, *Modo & Formâ* are material, as when a Feoffment is alledged by two, or by Deed, the Jury cannot find a Feoffment by one, or without Deed, for perhaps the other might be induced to join Issue on the Conveyance alledged, because he knew that there was none such.

If

If Land be let to *A.* for *L.* Rem'r to *B.*
 or *L.* Rem'r to *A.*'s Heirs, *A.* dies, *B.* en-
 ters and dies, a Stranger intrudes, *A.*'s Heir
 shall have a Writ of Right of *A.*'s Seisin as
 Tenant *L.* *A.* and *B.* are Jointenants *L.* *vid. supra,*
 Rem'r to *A.*'s Heirs, *A.* dies, *B.* dies, *A.*'s 269.
 Heir shall have a Writ of Right of *A.*'s Sei-
 sin. Donee in *T.* dies without Issue, Rem'r
 Man enters, Donee's Wife has a Child who
 enters, and dies without Issue, Rem'r Man
 shall have a Writ of Right of the Seisin
 which he had. So if Land be given to *A.* in
 Fee, Rem'r to him in Fee, he dies without Is-
 sue, his collateral Heir shall have a Writ of
 Right, tho' the Fee were not executed.

Tho' the Issue be on a collateral Point,
 yet if by finding of Part of it it shall appear
 to the Court that the Plaintiff had no Cause
 of such Action, *modo & formâ* are but
 form; as if in Trespass the Defendant
 plead that the Plaintiff holds of him by
 Fealty and Rent, and that for Rent he di-
 strained; and the other deny that he holds
 of him *modo & formâ*, and the Jury find
 that he holds of him by Fealty only, the
 Writ shall abate; for let the Tenure be of
 what Nature soever, the Tenant cannot *Marlbr. 3.*
 have Trespass against his Lord.

If the Matter of the Issue be found, it is 282.
 sufficient; as when on an Indictment of
 Murder, the Defendant is found guilty of
 Manslaughter, for the Killing is the Sub-
 stance. So in Assise of Darrein Presentment,
 if the Plaintiff alledge the Avoidance by
 Privation, and the Jury find it by Death;
 or in Assise by the Guardian of a Hospital
 against

against the Ordinary, if he plead that he deprived him in his Visitation as Ordinary whereon they are at Issue, and it be found that he deprived him as Patron; or in Debt on a Bond to perform a Covenant of not cutting down Trees, if a Breach be signed in cutting 20, and the Jury find it is sufficient.

Also in a Writ of Trespass for Goods carried away, or Battery, or false Imprisonment, if the Defendant plead that he is not guilty in the Manner as the Plaintiff supposes, and it be found that he is guilty another Day, or in another Town or County than the Plaintiff supposes, yet he shall recover; for in transitory Actions the Defendant shall not traverse the County or Town where the Fact is laid, without some special Cause of Justification, which is so local that it cannot be alledged in another Place; as where a Constable of a Town in another County arrests a Man for a Breach of the Peace; in which Case, if an Action be brought against him, he shall traverse the County, and all other Places, saving the Town whereof he is Constable; so where the Defendant justifies for Damage Feasant. In an Action of Slander laid in *London*, the Defendant pleaded a Concord for Words in all other Counties except *London*, and traversed the speaking there; the Plaintiff denied the Concord, the Defendant demurred, and the Plaintiff had Judgment: For in this Case the Court allowed a Traverse on a Traverse, lest by such an Invention this ancient Principle should be subverted, that

Place where a transitory Action is laid
shall not be traversable.

In Trespass if the Fact were not committed, the Defendant ought to plead not guilty; but if the Fact were committed, and he have Cause of Justification and Excuse, he must confess the Fact, and plead the special Matter, but if he plead not guilty, he cannot give the special Matter in Evidence; and the End of the Law in requiring such exactness in Pleadings (which, being drawn by Men learned in the Law, it is to be presumed will not be mistaken,) is that the Matter which is truly in Question between the Parties, should only be put in Issue, for otherwise a Cause might be lost by the Party's not being able to prove that in Court, which out of Court is known to all the World, and both Parties will be put to an unnecessary Charge: Therefore in Trespass, *quare Clausum*, &c. on a plea of not guilty pleaded the Defendant can't give in Evidence that they came through the Plaintiff's Hedge which he ought to keep in Repair. In Detinue, the Defendant on a plea of *non detinet* pleaded, cannot give in Evidence that the Goods were pawned for Money yet unpaid, but he may give in Evidence a Gift from the Plaintiff, for that proves that he retains not the Plaintiff's Goods. In Waste on a plea of *null Waste* pleaded, he may give in Evidence Lightning, Enemies, &c. but not justifiable Waste, as that he cut down Trees to repair the House, &c. If two be jointly bound, and one be sued alone, he may plead this in Abatement, but cannot plead *non est, factum*. If an Executor plead *Plenement administrator*

minister, and *issint riens inter mains*, if it be prov'd that he has Goods in his Hands which were the Testator's, he may give in Evidence that he has paid to the Value of his own Money, for thereby the Goods which he had as Executor become his own proper Goods. In an Affise, the Ten't on *Null tort null Disseisin* pleaded can't give in Evidence a Release after the Disseisin, but a Release before he may, for he could not disseise him whose Right he had by the Release. Collateral Warranty can't be giv'n in Evidence, when the *Mise* is join'd on the mere Right.

Where a Man can't take Advantage of the special Matter in Pleading, he shall give it in Evidence; therefore because one can't justify Killing, he shall give in Evidence that it was *se defendendo*, or in Defence of his House against Thieves, &c.

By 7 *Jac.* 1. 5. In Actions on the Case, Trespafs, Battery, or false Imprisonment against a Justice of Peace, Mayor, or Bailiff of a Corporation, High or Petty Constable, for any Thing done in their Offices they shall plead Not guilty, and give in Evidence the special Matter; So by 21 J. 1 4. *may the Defendant in an Information on Penal Statutes, except Recusancy and Champerty, and generally in late Statutes there is a Clause, that where a Man is sued for executing the Powers contain'd in them, he may plead Not guilty, and give the Special Matter in Evidence.*

If Dis'see enter on Dis'sor's Heir, and the Heir bring an Affise, he shall recover; but if he

he bring a Writ of Right, he shall be barr'd; and if he recover in Affise against the Dis's'ee, yet the Dis's'ee may have a Writ of Entry *en le per* against him, and recover.

A. dies seis'd, the Land descends to *B. C.* abates and dies seis'd, *B.* enters, *C.*'s Heir recovers in Affise against *B. B.* may have *Mort-ancestor* against *C.*'s Heir; and if a *A.* had been disseis'd, *B.* as Heir to him should have had a Writ of Entry *en le per*.

Tho' the Vouchee having enter'd into Warranty, or a Ten't to a *Præcipe* having aliened the Land, may take a Release from the Demandant; yet if a collateral Ancestor of the Demandant release to them with Warranty, they can't plead this against the Demandant; for the Release by a Stranger is void, because they are Ten'ts in Law only as to the answering the Action of the Demandant, but not as to other Purposes.

A Release of Actions Real is a good Bar in Actions mix'd, as Affise of *Novel Dis's'in*, *Waste*, *Quare Impedit*, (a) Annuity, and so is a Release of Actions Personal.

Actio est jus prosequendi quod sibi debetur in Judio, or *Action n'est autre chose que l'oyal demand de son droit*.

By a Release of Actions, Causes of Actions are releas'd; but in Submission of all Actions to Arbitrament, Causes of Actions are not contained; *because nothing shall be intended to be reserr'd to Arbitration, but Matters then in Controversy between them.*

A Man can't by his own Act alter the Nature of his Action, as if Lessee do Waste, and then surrender to his Lessor, or the Lessor

284.

(a) Cont.
S. W. Jones.
215.

285.

for release to him all Actions Real, the Lessee for can't have an Action of Waste for the Damages only: Yet after a Term for Years is expir'd, or a Lease *pur autre vie* is determined by the Death of *cestuyque vie* Lessee may have an Action of Waste for the Damages only.

When Part of an Action determines by Act of God, and the like Action lies for the Residue, the Writ shall not abate, as Waste and Ejectment, because they lie for Damages only, shall proceed, tho' the Lease determine hanging the Action; but a Writ of Waste shall abate, if the Inheritance determine hanging the Action, for the Disinheritance of the Plaintiff is the Ground of the Action: So if Ten't *pur autre vie* bring an Assise, and hanging the Action *cestuyque vie* die, the Writ shall abate, for an Assise lies not for Damages only: So if a Writ of Annuity be brought, and hanging the Action, the Annuity determine, the Writ shall abate, because it lies not for the Arrearages only: But if a Writ of Conspiracy be brought against two, and one of them die, it shall not abate, (notwithstanding the like Action lies not against the Survivor, *because the Tort, which is the Ground of the Action, is not lessened by the Death of one of the Defendants.* In an Assise by two, a Release of Actions Personal made by one of them, bars himself only, because such Action is partly Real; *Et omne majus trahit ad se minus.*

In Real Actions, wherein Damages are not recoverable at Law, as *Mortancestment*

Dower

power, Entry *sur Dis's'in*, &c. a Release of Actions Personal is no Bar; *because the Defendant may waive the Benefit of the Statutes, and bring his Action at Law for the Land only.*

Co. L. 100.
1 Lev. 38.

If an Affise of *Novel Dis's'in* be arraign'd against the Dis's'or and Ten't, the Dis's'or may plead a Release of Actions Personal, but not of Real, for none can plead such Release in an Affise but the Ten't. And the Ten't in Affise may plead a Release of Actions Personal to the Dis's'or, *because the Dis's'ee can't recover the Land in an Affise against the Ten't, without recovering Damages against the Dis's'or.* But he can't plead a Release of Actions Real made to the Dis's'or, *because the Affise is meerly Personal as to him.*

He in Rem'r shall not after the Death of Ten't *L.* plead a Release of Actions made to the Ten't *L.* neither shall the surviving Feoffee of the Heir of the Dis's'or plead such a Release made to his Companion; nor shall the Dis's'or Plead such a Release made by the Dis's'ee against his Heir.

286.

He that has Right of Entry may enter tho' he have releas'd all Actions; so if one take my Goods, or detain them, I may take them out of his Possession, tho' I have releas'd all Actions.

Detinue lies where one comes to Goods by Delivery or Finding: In this Action the Thing detain'd is to be recovered, therefore it must be so certain that it may be known, for which Cause Detinue lies not for Money out of a Bag, &c. But for Charters of the Inheri-

Inheritance it does if you know the Certainty of 'em, and what Land they concern, or if they be in a Bag sealed, &c. tho' you know not the Certainty of 'em. If you declare one in special, the Defendant shall not wage his Law, because it concerns the Realty, and for the same Cause Summons and Severance lies in such an Action. A *Capias* lies in Detinue of Goods, but not in Detinue of Charters in special, yet a Release of Actions Personal is a good Bar.

287.

4 H. 4. 7.

The Statute which before the 27 H. 8. 10 enabled a Dis's'ee to bring a Real Action against the Dis's'or, being Pernor of the Profits, after a Feoffment made by him, enabled the Dis's'or by Consequence to take from him a Release of Actions Real, and yet he had neither *jus in re*, nor *ad rem*, and he should have Benefit of such Release by special Pleading, and bar the Dis's'ee; and the Dis's'ee might enter, because the Ten't acknowledged himself a Dis's'or, In Dower the Ten't pleads that *A.* was seisd before the Writ purchased till he was by the Ten't disseis'd, and that hanging the Writ *A.* recovered; this is a good Plea in Abatement, and yet the Ten't acknowledges a Dis's'in in himself.

288.

A Release of all Actions Real and Personal, is no Bar in an Appeal of Death, or Robbery; for such a Release bars only civil Actions, not criminal; because an Appeal in which the Appellee shall have Judgment of Death, is not properly a Personal Action but a Release of all Actions, or Appeals, is a good Bar: And a Release of Actions Personal is a good Bar of an Appeal of *Mayhem*

A Release of Actions personal is no Bar in a Writ of Error to reverse an Outlawry by Process on the Original, because by such Writ the Plaintiff shall only be restor'd to his Goods, &c. against the K. but shall recover, or be restored to, or discharged of nothing against the Party, therefore it is not properly an Action: But such a Release bars Error to reverse a Judgment and Outlawry after it; it likewise bars an Attaint and *Audita querela*. And a Release of the Writ of Error is a Bar even in the first Case, for tho' the Plaintiff recover, or be restored to nothing by it against the Party, yet the Defendant is privy to the Record, and liable to Vexation by the Writ of Error.

Judgment of Outlawry is giv'n by the Coroners in the County in all Places but London, where the Mayor by Custom is Coroner, and Judgment of Outlawry given by the Recorder. Outlawry forfeits no Goods, neither does it disable, nor does Error lie upon it, till it appear of Record, either by the Return of the Exigent, or Removal of the Outlawry by *Certiorari*.

The Ten't releases to the Demandant after Recovery, all his Right, &c. He can't have Error, for he can't be restor'd to the Land.

If one recover Debt or Damages, and release all Actions, yet may he sue Execution by *Capias ad Satisfaciendum*, *Elegit*, or *Hieri Facias*. Note, Two old Records, wherein an infirm old Man found guilty in an Action of Trespass, and a Woman big with

Vid. supra.
193.

289.

with Child bringing a false Appeal, were not imprisoned.

Elegit, and Statutes are giv'n by Parliament. *Elegit* must be by Inquest. The Obligee can't pray, that the Extenders shall take the Land, &c. at the Rate at which they prise 'em in *Elegit*, but on Statute-Merchant or Staple he may. No Execution on any of these Acts shall go against the Heir within Age, or if two Daughters be Heirs, and one of 'em within Age. After full and perfect Execution by Extent return'd and of Record, there cou'd be no Re-extent on any Eviction; but if the Extent be insufficient, a new one shall go out.

By 32 H. 8. 5. If Lands had and delivered in Execution, be evicted before the Debt or Damages are wholly levied, the Ten't by Execution shall have a *Scire Facias*, and a new Execution: But the Act says, whereby the Ten't by Execution is clearly set without Remedy, therefore if but one Acre remain not evicted, or if the Eviction be by the Conusee of the former Statute, or by the Conusor's Wife recovering her Dower, or by his Lessee L. or T. there can be no new Execution.

Tho' the Act says, till he or his Assigns shall have levy'd the whole Debt, &c. yet if there be several Assigns, all shall hold it but till the whole be paid.

Tho' the Words be, when Land, &c. is delivered in Execution, the Act extends to any Ten't by Execution, as if Seigniorie be extended, and the Tenancy escheat, or enter after the *Liberate* himself. But it reaches

shes not a Villein's Perquisite, for the Lord is not Ten't by Execution thereof, but gains the whole Estate.

Executors, Administrators, and Assigns, shall have such new Execution, tho' it be not expressly giv'n to 'em. Tho' the Act say they shall have a *Scire Facias* out of the same Court; if the Record be removed into another, they shall have it from that.

Tho' the Statute give it against those that were Parties to the first Execution, their Heirs, Executors or Assigns; yet their shall be no new Execution against a Purchaser or his Assigns, if the first were against him, unless they have other Land liable to it; if several Assigns have Land subject to the Execution, one *Scire Facias* lies against all. No new Execution can be had against the Obligor, &c. unless he were Party to the first Execution. Nor can a new Execution, be had against the Purchaser's Executor, tho' he were Party to the first, *for the was had against the Purchaser only in respect of his Land purchas'd of the Debtor.*

A Release of all Actions, or Executions, is a good Bar in a *Scire Facias*, either in Actions Real or Personal, or on a Fine; for tho' a *Scire Facias* be a Writ of Execution, yet inasmuch as the Defendant may plead to it Matter to oust the Plaintiff of his Execution it may be called an Action.

If the Plaintiff after Judgment, release all Executions or Suits, and afterwards sue Execution, the Defendant shall have an *Audita querela*: But if K. release all Suits, yet may he have Execution, because the Court ought

291.

Vid. supra.
112.

ex Officio, to award Execution for him without any Suit, but not for a Subject.

After Execution sued, if Plaintiff release all Debts, or Duties, or Judgments, or Demands, an *Audita querela* lies.

A Release of Duties is no Bar in Account, for Duty extends only to Things certain; but what shall on the Account appear due is uncertain.

If Execution be sued on a Recognizance by *Elegit*, and Conusee make a Defeasance, that if Conusor do such an Act the Recognizance shall be void, by this the Execution is discharg'd

Demand is the largest Word in Law except Claim, for a Release of Demands discharges all Sorts of Actions, Rights and Titles, Conditions before or after Breach, Executions, Appeals, Rents of all Kinds, Covenants, Annuities, Contracts Recognizances, Statutes, Commons, &c.

1 Sid. 141.

1 Lev. 99.

3 Lev. 274.

But a Release of all Demands doth not discharge Rent incident to a Rev'n due after the Release, and generally if it be made on a particular Occasion, that shall restrain the Generality of the Words.

292.

If one release *omnes querelas aut loquelas*, this is as large as a Release of all Actions, and releases all Causes of Actions tho' no Suit be then depending.

A Release of all Actions discharges a Bond to pay Money on a Day to come, for it is *debitum in presenti quamvis sit solvendum in futuro*; and it is a Thing meerly in Action, and the Right of Action is in him that releases, tho' no Action lie when the Release

is made: So may an Executor release an Action before he has prov'd the Will, and some say that the Ordinary may release an Action, tho' he can have none: But a Release of Actions does not discharge a Rent before the Day of Payment, for it is neither *debitum* nor *solvendum* at the Time of the Release, nor is it meerly a Thing in Action, for it is grantable over: And the Law is the same as to an Annuity; but the Lessor may release or acquit the Rent, &c. A Release of Actions by a Covenantor to his Covenantor, is no Bar to an Action for a Breach of a Covenant after the Release; but a Release of Covenants discharges the Covenant itself.

The Lessor may have an Action of Debt for Rent after each Day of Payment, for it is reserv'd *for the Lessor's Maintenance* in Lieu of the Profits; but no Action lies on a Contract to pay Money at five several Days till all be past, *for there is but one Contract, and one Debt, and consequently there can be but one Action of Debt*; but if a Recognizance be to pay Money at five several Days, after the first Day of Payment Execution lies for the Sum that then ought to be paid, for it is in nature of several Judgments: And the Law is the same of such a Covenant, or Promise to pay Money, &c. *for as often as the Money is not paid according to the Covenant and Promise, so often is there a Breach of the Covenant or Promise, and consequently so often an Action lies.*

After the *Mise* join'd on the meer Right, the Ten't may tender half a Mark to have

the Seisin inquir'd, (except when the K. is Demandant,) and if the Seisin be not found in the Time of the K. whereof the Demandant counts, he shall be finally barr'd: if it be found for him, the Jury shall enquire over.

The Oath of the Jury in Writ of Right is
 ' I will truly say whether *A. B.* has more
 ' meer Right to hold the Tenements which
 ' *C. D.* demands against him by his Writ of
 ' Right, or *C. D.* to have 'em as he de
 ' mands, &c. *So help me God.*

N. B. This Oath is absolute without saying to their Knowledge, for Judgment final is to be giv'n, as in Attaint and Law Wager.

294.

The terrible Judgment in Attaint is mitigated by the 2; *H. 8. 3.* Tho' the Words are that the Party griev'd shall have it against the Party that shall have Judgment on the Verdict, yet it lies against his Executors.

- (a) Bro. 15. *The K. (a) may have an Attaint for a false Verdict in a Civil Action brought by him; but*
 (b) Bro. 127. *in an Information, (b) Qui tam &c. neither the K. nor Informer are fully Parties, and therefore neither of them can have an Attaint. (c) But the Defendant in such a Suit shall have an Attaint, tho' it lie not where the K. is sole Party.*

No Conusance shall be granted in Attaint, because the Statute says expressly that all Attaints shall be brought in one of the Benches.

The Defendant in some Cases may wage his Law, *i. e.* swear that he owes not the Debt demanded, nor any Penny thereof.

and this is a perpetual Bar to the Plaintiff: He that does it, ought to bring with him 11 Persons that shall avow on their Oaths, that they think he swears true.

It lies in some Cases in Debt, Detinue and Account; it lies for a Feme Covert, together with her Husband; for an Alien in the Language he can speak; in Debt on Arbitrament, or Detinue on Bailment by another's Hand, for the *Debet* or *Detinet* is the Ground of those Actions, and the Contract or Bailment is but the Conveyance, and not traversable; it also lies for an Amercement in a Court-Baron; for the Successor of an Abbot, because the House never dies.

But it lies not in Actions grounded on a Specialty; nor for one infamous; nor where the Plaintiff or Defendant is an Infant; nor where the Suit is for *K.* or his Benefit, as a *quo minus*, or Actions wherein a Contempt or Trespas is suppos'd in the Defendant, *in which if the Defendant be found guilty, he shall be fin'd*; nor in Actions grounded on the Defendant's Breach of Promise, or a Tort done by him; for the Law will not trust his Honesty in discharge of such Actions which are grounded on a Supposition of his Injustice; nor does it lie in Actions which are not grounded on what was transacted meerly between the Plaintiff and Defendant, but on the Act of another Person, as in an Account against a Receiver on a Receipt *per autremains*, where the Receipt is the Ground of the Action, and traversable, but it would have lain if the Receipt had been by the Hands of his Wife, or of

one of his Monks, for such a Receipt is all one in Effect as a Receipt by the Defendant's own Hands in Respect of the Privy between them. Nor does it lie in an Action sounding in the Realty, as Account against a Bailiff, or Debt for Rent, or Detinue of an Indenture of a Lease, &c. Nor for a Debt of Record, or an Amercement in a Court-Leet; nor does it lie in Debt for an Account found before Auditors, nor in Debt against the Lord found in Surplusage on such Account, by Construction of *W. 2.* Nor in Debt by a Jaylor for Victuals, because he can't refuse the Prisoner; nor in an Action by an Attorney for his Fees, or by a Labourer retain'd according to the Statute for his Wages, because the first is compellable to be the Party's Attorney, and the other to be his Servant; nor in an Action on a Penal Statute, nor for an Executer or Administrator.

Of Confirmation.

Confirmation is a Conveyance of an Estate or Right *in Esse*, by which a voidable Estate is made sure, or a particular Estate increas'd: But it strengthens not a void Estate, nor does it enlarge without Privy any more than a Release.

296.

Tho' a Release by a Lessor *L.* to the Lessee *T.* of his Lessee, or by a Dis's'or to the Lessee *T.* of his Dis's'or, be void; yet in both Cases a Confirmation is good: But a bare *interesse termini* can't be confirm'd.

Lessee

Lessee *L.* makes a Lease for 30 *T.* and after makes another for 60 *T.* and Lessor confirms the 2d, and then confirms the first; Lessee *L.* dies within the 30 *T.* Lessee for 60 *T.* may enter. Moore 67.

If the Estate of Tenant in Fee, *T.* or *L.* be confirmed for a Day or an Hour, it is good for ever; and herein a Release and Confirmation agree. And if the Estate or Demise, or Term of Lessee *T.* be confirmed for a Day, it is good for the whole, for the Addition of Parcel is repugnant, when all was confirmed before. But the Land may be confirmed to Lessee *T.* for Parcel of the Years, for the Years are several, but a State of Freehold is entire, and cannot be confirmed for Part of the State.

A Dissee, or Patron and Ordinary, may confirm a Lease *T.* for Part in Respect of their Right or Interest: Yet an Attornment, which is a bare Assent, cannot be for Part, or on Condition. 297-

A Release of a Rent, Right, or Condition to Lessee *L.* enures to him in Rem'r or Rev'n; yet a Confirmation of a State *L.* does not, whether the particular Estate and Rem'r or Rev'n be in the same Person or diverse. But the Confirmation of the Estate of one Jointenant enures to both: And if a Lease be made to *A.* and *B.* Rem'r to *B.*'s Heirs, the Confirmation of *B.*'s Estate confirms the Fee, for to many Purposes he had the whole Fee in him. A Feme Dissee makes a Feoffment to the Use of *A.* for *L.* Rem'r to her self in *T.* &c. and marries the Dissee who releases to *A.* this

fects his Wife's Rem'r; for tho' a Man cannot contract with his Wife, or transfer any Interest to her, yet she may by Construction of Law take Benefit of his Release made to a third Person, and enuring by Way of Extinguishment. But if Lessee *L.* make a Lease *L.* Rem'r to his Lessor, who releases to the 2d Lessee, he cannot by this Release perfect his own defeasible Estate, but after 2d Lessee's Death he shall be in his old Estate.

298.

But a Confirmation and Release agree in this, that either of them made to him in Rem'r, or Rev'n, enure to the Benefit of the particular Estate, whether they be made by Disseisee or Feoffor on Condition, for they cannot enter, *but in Respect of their Right or Title to their ancient Estates, which they cannot revest, without divesting the particular Estate, which against their own Deed they shall not do.* If Tenant *T.* discontinue, and Discontinuee make a Lease *L.* and grant the Rev'n to the Issue, now the Issue shall not have a Formedon, for by that he must recover an Inheritance; but the Lessee hath not the Inheritance, but the Issue in *T.* himself has it.

If Dis'sor make a Lease *L.* and levy a Fine of the Rev'n, and five Years pass, the Dis'see cannot enter on the Lessee *L.* for his Estate cannot be avoided without avoiding the Rev'n, &c. But if the particular Estate be by defeasible Title, and the Remainder by good Title, the defeating that defeats not this; as if Lessor *L.* disseise Lessee, and make a Lease for *L.* of the

first Lessee, Rem'r to C. and the first Lessee enter, he leaves the Rem'r in C. for the first Lessee shall regain no more than the Estate whereof he was disseised; nor shall the Lessor's Estate be reverted in him against his own Conveyance. And in many Cases a Rem'r once well vested, may subsist tho' the particular Estate cease. As if a Lease *T.* be made to an Infant, Rem'r in Fee, and the Infant disagree at full Age: Or if a Lease be made to *A.* for *B.*'s Life, Rem'r to *C.* *A.* dies, before the Occupant enters there is no particular Estate, yet the Remainder continues. So if a Rent be granted to the Tenant of the Land for *L.* Rem'r in Fee, this Rem'r is good; for in Judgment of Law the particular Estate vested for an Instant in the Ten't of the Land, tho' it were afterwards immediately suspended. A Rent is granted to *A.* for *B.*'s *L.* Rem'r to *B.*'s Heirs, this Rem'r. is good; yet the particular Estate must determine, and the Contingency happen in the same Instant; but a Rem'r which is to commence on a future Contingency, falls to the Ground if the particular Estate which supports it determine before the Contingency happens: But by 10 & 11 W. 3. 16. where an Estate is limited to one for *L.* with a Rem'r to his Son or Daughter, &c. they may take tho' they be born after their Father's Death.

Vid. *supra.*
52.

Vide; *Lev.*
408.

A Release by a Dissee to one of his Disseisors, enures to him alone; but if the Estate of one be confirmed without saying more, he shall not hold his Companion.

out, because nothing was confirmed but his Estate which was joint: But if these Words be added, To have and to hold the Land to him and his Heirs, he shall hold out the other. If the Disseisee and *A.* disseise the Dis'sor's Heir, or the Grantee of Rent and *A.* disseise the Ten't, and Dis'see or Grantee confirm the Estate of *A.* yet in neither Case doth this extend to pass or extinguish the Right or Rent suspended, as a Release doth. It is said, that if one Jointenant confirm the Estate of the other, that it remains joint; but if he add, to have and to hold the Land to him and his Heirs, the other shall have a sole Estate. And if Lessor confirm the Estate of his Lessee, to hold his Estate in Fee, he passes nothing, for an Estate *L.* cannot be an inheritance; but if he confirm the Estate by these Words, to have the Land to him and his Heirs, he gives the Fee, for the *Habendum* and Premises agree in Substance, and the *Habendum* may enlarge, tho' it cannot abridge the Premises.

299.

A Release and Confirmation agree in this, that either of them made by a Lessor *L.* to the Husband of a Feme Lessee and the Wife, *habend'* for Term of their Lives, give the Husband an Estate by Way of Rem'r, or Increase of his Estate, for Term of his *L.* after her Death. If the Confirmation had been to them in Fee, it had given them the Fee jointly, and he had been seised in her Right for her Life. And if a Lease be made to Husband and Wife, *habendum* one Moiety to him for *L.* the other

her to her for *L.* and then the Lessor confirm the Estate of both, *habend'* to them and their Heirs, this gives them a joint Fee in the Wife's Moiety, and the Husband a sole Fee in his own, for the Husband's Estate in the Wife's Right in the one Moiety is as capable of a Confirmation as his own Estate in the other. A Confirmation of the State of two Lessees in Common or joint Donees, *Habend'* in Fee, gives them a Fee in Common, for it enures according to the Quality of the State enlarged.

A. is Ten't *L.* with a Rem'r to *B.* for *L.* Lessor confirms the Estate of both *habend'* to them and their Heirs, *A.* is Ten't *L.* for one Moiety, Rem'r to *B.* for *L.* Rem'r to *A.* in Fee; of the other *A.* is Ten't *L.* Rem'r to *B.* in Fee, for *B.*'s Rem'r of the Fee in the Moiety drowns his particular Estate.

In the Case above where the Husband has a Rem'r for *L.* and the Wife is Ten't *L.* or where a Lease *L.* is made to *A.* Rem'r to him for *L.* of *C.* if the Husband or *A.* commit Waste, an Action of Waste lies, for the intermediate Rem'r *L.* in the same Person that does the Wrong, shall not make it dispunishable.

If one make a Lease *T.* to a Feme Sole, who marries, and then the Lessor confirm the State of the Husband and the Wife, *habend'* the Land for Term of their two Lives, this gives 'em a joint Freehold, for they had none before, and tho' the Wife's Freehold be not in the Husband's Disposal, a Lease *T.* is.

It

It is said that whatever I may defeat by my Entry, I may make good by my Confirmation; therefore if a Feoffor on Condition confirm a Grant of Rent by the Feoffee, or a Dissee confirm a Grant by the Dissee or his Heir, the Rent remains after Re-entry or Recovery, whether the Entry were lawful when the Confirmation was made or not: But in all these Cases a Release would be void.

At Law, if the Patron and Ordinary, or the Patron alone of a Chapel Donative, had confirmed a Grant of a Rent made by a Parson or Chaplain, or licensed them to make such Grant, it remained effectual according to the Purport of it. *Persona Impersonata* is the Incumbent of a Church Parochial, in whose Person the Church may sue for, and defend her Right.

The Ordinary alone may confirm without Consent of Dean and Chapter, but when the same Person is Patron and Ordinary, his Confirmation can't make it good after the Decease of the Incumbent, but only during his own Life, unless Dean and Chapter agree. For the Advowson is Part of the Possessions of the Bishoprick, the Value whereof can't be lessened by the Bishop without their Consent.

If one be Patron of the Church of *B.* as Parson of *C.* his Confirmation of the Grant of a Rent out of *B.* without his Patron's Assent can't make it perpetual, no more than that of Ten't *L.* If the Estate of the Patron that confirms a Grant be conditional, and

defeat then the Condition be broken, the Confirmation is void.

A Confirmation by Ten't *T.* remains good only during his Life, and that of the Successor's that come in by him; but if the entail be barr'd, it is good for ever; if it be discontinued, it is good during the Continuance.

In all Cases the Confirmation must be during the Life of the Incumbent that made the Grant, for after his Death it is absolutely void.

No sole Corporation could ever make an absolute Alienation without the Consent of some other, but all Corporations Aggregate of many Persons capable, as Dean and Chapter, &c. or the Head of a Corporation Aggregate of many Persons dead in Law, as an Abbot or Prior with the Consent of the Covent, might make an absolute Alienation; so might a Bishop with a Confirmation of the Chapter; and if there were two Chapters with the Confirmation of both, and if one of them were dissolved with the Confirmation of the other, but the Consent of the Founder or Patron was not required.

If a Diss'or make a Deed of Feoffment, and a Letter of Attorney to deliver Seisin to *A.* and the Disseisee confirm the Estate of *A.* or the Deed made to *A.* this is clearly void. But if a Bishop had made a Deed of Feoffment, and Letter of Attorney, or a Charter to *K.* and before Livery or Inrollment the Chapter had confirmed the Deed

or Charter, this was good, for the Assent is sufficient.

If Ten't *L.* whether on Condition or absolute, grant a Rent in Fee, a Confirmation by Lessor makes it effectual, (and yet by Law it was determinable by Death of Ten't *L.*) because the Grant was in Fee. But if the Grant be to the Grantee and his Heirs by express Words for the Grantor's Life, and Lessor confirm it, it shall determine by the Death of the Grantor.

Dedi & Concessi are general Words, and may amount to a Grant, Feoffment, Gift, Release, Confirmation, Surrender, &c. therefore if a Dis's'ee by Deed *dat vel concedit* the Land to the Dis's'or, this amounts to a Confirmation; or if a Lessor make a Deed with such Words to the Lessee, it gives him an Estate *L. T.* or in Fee, according to the Purport of it; and if he make a Deed to him in these Words, *voluit quod haberet Terram pro Termino Vitæ*, he enlarges his Estate for Term of *L.* and there are many other Words as *Dimisi*, &c. which one may use in Confirmation.

But a Release, Confirmation, or Surrender, &c. can't amount to a Grant, &c. nor a Surrender to a Confirmation or Release, for these are peculiar Conveyances destin'd to a special End.

If the Parson and Ordinary make a Lease *T.* of the Glebe to the Patron, or a Dis's'or grant a Rent to the Dis's'ee, or make a Lease *L.* Rem'r to the Dis's'ee; in all these Cases; if the Patron or Dis's'ee respectively grant o-

ver

ver the Term or Rent, or Rem'r, such Deed amounts to a Grant and Confirmation, for they can't avoid their own Grants.

If the Dis's'ee and Dis's'or's Heir join in a Feoffment by Deed, this is the Feoffment of the Heir, and Confirmation of the Dis's'eisee, for the Land ever passes from him that hath the State in him; so where *Cestuyque Use*, and the Feoffees joined in a Feoffment after the 1 R. 3. it was the Feoffment of the Feoffees: but if the Dis's'or and Dis's'ee join in a Deed of Feoffment, and enter, and make Livery, it is the Feoffment of the Dis's'ee, and Confirmation of the Dis's'or.

If Ten't *L.* and he in Rem'r or Rev'n in Fee join in Feoffment by Deed, the Freehold moves from Ten't *L.* the Fee from the other: If at Law they had joined in a Parol Feoffment, the Whole moved from him that had the Fee, and it is said that it shall be construed a Surrender of Ten't *L.* *for in the first Case the Freehold shall pass from Ten't L. and the Deed of Feoffment shall amount to a Grant of the Rev'n, but a Rev'n can't pass by Parol, therefore in the 2d Case the Law will construe the Fee to be executed in the Lessor, by an implied Surrender of the State L.*

If Ten't *L.* and he in Rem'r in *T.* join in a Fine, this is no Discontinuance, for the Grant of the Rem'r in Judgment of Law, precedes the Grant of the particular Estate. But if Ten't *L.* and he in Rem'r *L.* join in a Feoffment, both forfeit their Estates, nor shall

1 Rep. 76.

shall it be construed the Feoffment of Ten
L. and Confirmation of the Rem'r Man.

303.

In good Order you must plead, 1. To the Jurisdiction. 2. To the Person; first of the Plaintiff, then of the Defendant, 3. To the Count. 4. To the Writ. 5. To the Action. And if any of these are misordered, the Benefit of the former is lost.

The Count must be conformable to the Writ, the Bar to the Count, &c. and the Judgment to the Count, and none narrower or broader than the other.

It is sufficient in Bars to have a Certainty to a common Intent, *i. e.* *That it be so certain that, generally speaking, if it be true, the Plaintiff can have no Cause of Action, as in Trespass it is a good Bar that the Land is the Defendant's Freehold, and yet it may be that he has leased it for T. to the Plaintiff, &c.* But in Indictments, Counts, Replications, &c. a greater Certainty is required, which is called a Certainty to a certain Intent in General; for if without a violent Construction of the Words of the Record they may be true, and yet the Defendant not guilty, the Law will not condemn him, as if one be indicted for coining Alchymy, *ad instar Pecuniæ Regis*, without shewing what Money. But in Estoppels, which are odious, because they conclude a Man from alledging the Truth, there must be a Certainty to every Particular, and therefore Exceptions may be taken against them which are so nice, that they will not be allowed in any other Case.

A Plea

A Plea in Abatement of the Writ, or after the latter Continuance, ought to be pleaded certainly.

The ancient Forms of Pleading are to be observed, therefore in Counts it is sufficient to say *cum J. S. seifitus, &c. Dimisit*, or *Dedit*, without expressly saying that he was seised, and did demise, (yet the Plaintiff, if he will, may say so,) but in Bars, Replications, and other Pleas, a Seisin must be alledged in Donor or Lessor.

*Counts and Avowries (because they are in the Nature of Counts) need not to be averred, but all other Pleas in the Affirmative must be averred, but those in the Negative ought not.

Matter of Inducement, which is only alledged in order to bring in the principal Matter, needs not to be so certainly alledged as Matter of Substance.

All Pleas must be alledged directly, and not by Way of Rehearsal, nor is it sufficient that what ought to be expressly pleaded may be deduced by Argument from what is pleaded

When a Record is the Ground of the Suit, or of the Substance of the Plea, it must be certainly alledged; but Sentences in Courts Ecclesiastical may be alledg'd Summarily, as that a Divorce was betwixt such Parties for such a Cause, and before such a Judge, & *concurrentibus his quæ in jure requiruntur*. For it is to no Purpose to alledge them particularly, because the Forms of those Courts are different from those of Common

Common Law, and our Judges presume that they are observed by the Judges of the Courts, but the Judge must be named, that the Court may write to him.

It may be generally alledged that *J. S.* was seised in Fee-Simple, but the Commencement of particular Estates must be shew'd, (*because they could not originally commence without a Conveyance which must be shew'd*) unless they be alledged by Way of Inducement only.

Special and substantial Matter alledged by either Party ought to be specially answered, and not passed over in general Pleading.

All Pleas are construed most strongly against him that pleads them.

No Plea is good, whereof no Trial can be had.

The Ten't before his Default saved may plead Pleas proving the Writ abated, (*because it is Error in Fact to proceed after*) or Matter apparent in the Record, but not those which prove it only abateable, as taking Husband.

Where one is authorized to do a Thing by Common Law, Statute, Custom, Grant, or Commission, he ought to pursue the Substance of it accordingly.

Necessary Circumstances, as Livery and Attornment in the Plea of a Feoffment of a Manor are implied.

A Defect in Count, Bar, &c. by Omission of some Circumstance may be saved by the Plea of the adverse Party, but Insufficiency of Matter cannot.

Sur-

Surplusage vitiates not, unless it be contrariant to the Matter before.

What is apparent by necessary Collection from the Record needs not to be averred.

As to affirmative Covenants, one may plead generally Performance of all; but as to those in the Negative he must plead specially: Of Disjunctives, he must shew which he hath performed; those to be proved of Record must be shewn specially.

Pleas amounting to the general Issue are not to be allowed, but the general Issue is to be enter'd. *But where the Matter pleaded contains Matter of Law it may be pleaded, notwithstanding it may be shewn to the general Issue.* 2 Vent. 295.

Pleas ought to conclude properly, those to the Writ to conclude to the Writ, those to bar to the Action, Estoppels must rely on the Estoppel.

Where a Man shews the special Circumstances of his Case, and concludes & sheweth he did such and such a Thing, the Conclusion waives not the special Matter, but the Generality thereof is qualify'd thereby, but regularly where the Conclusion is in the Negative, the special Matter is waived, especially where it goes to the point of the Action, for there the special Matter is alledged to no Purpose; but in an Action on a Bond, one may plead that he was delivered to J. S. to be delivered to the Obligee on a Condition not yet performed, and so it is not his Deed, and the special Matter is not waived.

Finch of
Law, 419.
1 Ven. 210.

304.

Finch, 393.

A second Plea containing Matter subsequent to the former, and not fortifying the same, (which is called a Departure,) is vitious, as when the Ten't pleads a Descender and the Demandant avoids it by Pleading a Feoffment from the Ten't, and he rejoins that the Feoffment was on Condition. So if one plead Performnce of Covenants, and the Plaintiff reply, that he did not such an Act, &c. and the Defendant rejoin that he offered to do it. Or if a Man in his Bar make a Title at Common Law, (as if he plead generally that a Lease T. was made to him, &c. which being generally alledged, shall be intended to be meant of a Lease made good by the Rules of Common Law,) and in the Rejoinder maintain it by Custom or Statute. Or if one plead a Feoffment in Bar, and maintain it by Disfranchisement and Release, or Lease and Release; or plead a Gift in T. and maintain it by a Recovery in Value. But one may count of a Gift T. and make it good in the Replication by a Recovery in Value, *of the Lands in Question by Force of a Warranty, in lieu of other Lands in T. evicted from the Donee, whereof he shall be seised of such Estate as he had in the Land lost*, for there can be no other Count: And he that pleads a Feoffment in Bar, may plead a Release to his Feoffor in the Rejoinder, for it fortifies the Bar.

Tho' one may in proper Time use divers Dilatories, yet a Plea in Bar containing double Matter, viz. requiring several Answers

ers, is vitious, but where there are di-
 verse Defendants, each of them may plead
 several Pleas; and by 4 & 5 Annæ 16. one
 may with Leave of the Court plead diverse
 Matters in Bar, and on a general Issue one
 may give as many distinct Matters as he
 can in Evidence; they may also be found
 by special Verdict.

If he that has a Seigniory, Rent or Com-
 mon, confirm the Estate of the Ten't of
 the Land, yet the Charges and Services re-
 main, but if he release to the Ten't he ex-
 tinguishes them. The Lord can't by Re-
 lease or Confirmation reserve any new Ser-
 vices, but he may abridge the old and
 if a Mesne confirm the State of an Ab-
 bot, that holds by certain Services, to hold
 of him in Frankalmoine, this is good, for
 nothing new is reserv'd, but only that he
 holds of him as he did before; if the Lord
 release Part of the Services, Relief, &c.
 incident to the Tenure still remain, and are
 not discharged without special Words; and
 if Lord by *Kt.*'s Service release all his Right,
 and all Actions, Services and Demands ex-
 cept the Tenure by *Kt.* Service, Wardship,
 &c. remain.

If Donor reserve 2 s. *pro omnibus Servi-*
ciis: Q. If Donee shall pay Relief.

It seems the Lord Paramount can't by his
 Release or Confirmation abridge the Ser-
 vices of Ten't Paravail for Want of Privity.

Q. If Confirmation can abridge a Rent
 charge, as it is certain a Release may.

Tho' one may detain a Villein in Gross,
 yet he can gain no Possession of him as of
 his

305.

306.

his Villein, nor put the Owner out of Possession, therefore a Confirmation of the Estate of such a Detainer is void; unless there be Words of Grant in it, and then it enures as a Grant, not as a Confirmation.

Contra
Hob. 99.

But one may be ousted of the Possession of the Custody of his Ward. And the Possession of a Villein regardant may be gained by Diss'in of the Manor, and whilst the Diss'ee's Entry is lawful, he may re-seise him before he enters; and Things regardant and appurtenant pass by Feoffment of a Manor, without saying *cum pertinentiis*.

307.

The Grant of a Seigniorie or Rent Charge to the Ten't, enures by Way of Extinguishment, for the same Man can't be Lord and Ten't, or receive Rent out of his own Land. Such a Grant to the Ten't and a Stranger enures by Way of Extinguishment as to one Moiety, and by Way of Grant as to the other.

The Release of a Lessor *T.* to his Lessee enlarges his Estate for *L.* but his Confirmation enlarges it not at all.

308.

An Infant makes a Lease *T.* and the Lessee grants Part of the Term to another, and the Infant at full Age releases to the Grantee, his Release is void for want of Privy; but if the Lessee grant the whole Term, the Lessor's Release to the Grantee is good, and his Confirmation is good in both Cases.

If a Man grant a new Rent for *L.* and then confirm the Estate of his Grantee in Fee, he enlarges not his Estate without a new Clause of Distress, because he that con-

firms

firm hath no Rev'n in the Rent. But if one seis'd of a Rent in Fee grant the same for L. he may by his Confirmation or Release enlarge the Estate of the Grantee.

If the Grantee of a new Rent surrender or cancel the Deed by which it was granted he destroys the Rent, *but it seems that if a Stranger destroy the Deed, the Rent is not destroy'd thereby, tho' a Thing merely in Action be destroy'd by the Destruction of the Deed by a Stranger, and if the Grantee of the Rent deliver up the Deed to the Grantor, he does not thereby surrender the Rent, but he may sue for it, if he can get the Deed again, for a Chose in Grant must be surrendered by Deed.*

1 Vent. 297.

Of Attornment

Attornment is the Agreement of a Ten't to the Grant of a Seigniori, Rent, Rev'n, or Rem'r, (*without which no grant thereof could take any Effect before 4 & 5 Annæ 16. by which Statute Attornment is made needless.*) It ought to have been in the Life of the Grantor and Grantee, and might be express'd or imply'd; express Attornment is by Words or Writing expressing the Ten't's Agreement, as saying that he agrees, or using words Tantamount. An implied Attornment is when the Ten't knowing of the Grant, pays the Rent to the Grantee, &c. but there could be no Attornment without Notice of the Grant express'd or imply'd, therefore if a Bailiff who us'd to receive the Rent had purchas'd a Ma-

309.

T

nor,

nor, Payment to him without Notice of the Purchase was no Attornment: So if the Lord had levy'd a Fine, and taken back a State in Fee, and the Ten't had continued Payment.

Attornment was good, tho' the Thing granted were altered before Attornment, as if a Rent Service became Seck by Surplusage: and if the Grant were of two Acres, and a Fine levy'd of one before Attornment, yet the Ten't might attorn for the other.

If the Rev'n of three Acres were granted, and Lessee attorn'd for one, or surrender'd one to the Grantee, this was good for all. So if the Grant were to two, and he attorn'd to one according to the Grant, this enur'd to doth; and if one died he might attorn to the Survivor. Attornment to Grantee *L.* enur'd to the Benefit of Rem' Man, tho' the Ten't said expressly that he attorn'd only to the Grant for *L.* *for Attornment being but a bare Agreement to a Grant could neither enlarge nor diminish the Operation thereof.* Attornment to Cestuique Use was a good Attornment to the Grantee.

310.

If a Grant were made to *A.* for *L.* Rem'r to *B.* in Fee, and *A.* had died, there could be no Attornment to *B.* *for one can't take a present Estate in Possession by Force of such Words in a Grant which gives him a Rem'r only.* But if a Grant were to a Man and a Woman, and before Attornment they intermarried, the Attornment was good, tho' they did not then take by Moieties, *for the Words of the Grant may still have*

have their Effect according to the Purport of it, tho' the Quality of the Grantee's Estate be different from what it would have been, if the Ten't had attorn'd before Marriage.

If a Feme had married her Grantee before Attornment, yet might the Ten't attorn, but not if she had married another, for that would have been an imply'd Countermand of the Attornment *which would then be to the Husband's Purjudice, and defeat his Estate for the Wife's Life gained by the Marriage*, and if Grantor before Attornment had made a Grant to another, and the Ten't had attorn'd to the 2d Grantee, he could not after attorn to the first, tho' the first Grant were in *T.* the 2d for *L.* So if a Rev'n on a State *L.* were granted, and before Attornment the Estate *L.* were confirm'd in *T.* the Attornment was countermanded; so if a Grant were made of a Rev'n on a State for *T.* and before Attornment, the State of the Lessee were confirmed for *L.*

Where there were two several Grantees, Attornment to both was void, *for by the Purport of each Grant the Whole is expressly given to the respective Grantees, and it shall not be in the Power of the Ten't to make such Grants enure by giving a Moiety only to each.* So if a Rev'n were granted for *L.* and after granted to the same Man for *T.* and Ten't attorn to both Grants. Or if one Grant were made to *J. Bishop of L.* and his Successors,

cessors, and another to him, and his Heirs, and the Ten't attorn'd to both.

If *A.* had granted *B.* Acre or *W.* Acre, and Ten't had attorn'd, and Grantee make his Election, the Attornment was good, for it was made to the Grant in such sort as the Grant was made.

If a Man had alien'd a Manor, which was Parcel in Demesne and Parcel in Service, the Services without Attornment pass'd not in Possession, nor in Right except those of Ten'ts *W.* or Copyholders which needed no Attornment

The Attornment had Relation to some Purposes to make the Thing granted pass from the Grantor *ab initio*; as if the Grantee were an Alien before Attornment made Denizen, *K.* should have the Thing granted for as between the Parties it so pass'd, but not so as to charge the Ten'ts with Arrear of Rent, or for Waste in the mean Time.

311.

If a Lord had let his Mannor for *L.* or *T.* and the Ten'ts had attorn'd, and then the Rev'n were granted, the Attornment of such Lessee bound the Ten'ts of the Manor.

On Grants of a Seignior, Rent-Service Rev'n or Rem'r, he that was immediate privy to the Grantor ought to attorn; therefore if there were Lord and Ten't, and the Ten't had made a Lease *L.* or Gift *T.* &c. or if there were Lord Mesne and Ten't, and the Lord had granted his Seignior, he in Rev'n in the first Case, or Mesne in the 2d, ought to have attorn'd. If Ten't in Fee had made a Lease *L.* Rem'r in Fee, the Ten't *L.* ought to have attorn'd to

Gran

Grant of the Seignior, for he was Ten't
 as to this Intent to the Lord, for during
 his Life the Lord shall avow upon him on-
 ly, and yet the Rem'r is also holden medi-
 ately of the Lord, and shall escheat if he
 in Rem'r die without Heir, and such Es-
 cheat shall drown the Seignior, for there
 can't remain a particular Estate in it: But
 if a Rent-Charge in Fee be granted for L.
 and then he that has the Rev'n of the Rent
 purchase the Land, the Grantee shall en-
 joy it for L. *for the Rent-Charge can have
 no other Estate issuing out of it to which it
 may have Relation, but in the Case above,
 when an Estate for L. only remains in a
 Seignior, it can't support the Seignior par-
 amount.*

Vid. 373.
 231.

But to a Grant of a Rent-Charge, or Rent-
 Seck issuing out of a Freehold, the Freehold-
 er was to attorn, because the Freehold was
 charged; therefore tho' the Dis'see might
 have attorn'd to a Grant of a Rent-Service,
 the Dis'sor only could attorn to a grant of
 a Rent-Charge. And if the Lord had grant-
 ed the Rent without the Homage, the Dis-
 s'or only could attorn, for it pass'd as a Rent-
 Seck. If the Rev'n only were charged with
 a Rent-Charge, he in Rev'n should attorn
 to the Grant of it. The Law remain'd
 as to the Difference of Attornment after
 the 21 H. 8. 19. for tho' the Lord needed
 not avow on any Person in certain, the Pri-
 vity remain'd notwithstanding between him
 and the Ten't.

312.

If he that had a Rent-Charge in Fee had
 granted it for L. and the Ten't of the Land
 T 3 had

had attorn'd, and then the Rev'n of the Rent-Charge were granted, the Grantee for *L.* might have attorn'd alone.

There was no need of Attornment, except to Grants of Rem's, but where the Ten't was to be subject to Tenure, Attendance, or Payment of Rent to the Grantee, therefore it was not requir'd in Grants of Commons, Annuities, &c.

Attornment of the Husband bound the Wife, and where he that should attorn was Grantee, Acceptance of the Deed was sufficient Attornment: Therefore if there were Lord and Ten't and the Ten't had made a Lease *L.* to a Feme, Rem'r in Fee and Lease *L.* had marry'd, and the Lord had granted his Seigniority to the Husband, who in Right of his Wife ought to have attorn'd, and he had accepted the Deed, this was a good Attornment in Law; and tho' the Services were suspended during the Coverture, the Husband shall have them after the Death of his Wife. If the Lord had granted the Services to the Ten't, and a Stranger, and the Ten't had accepted the Deed, this had extinguish'd the one Moiety, and vested the other in the Grantee. If the Lord had granted the Seigniority to the Wife of his Ten't, and the Ten't had accepted the Deed, this was a good Attornment; and tho' the Services were suspended during the Coverture, the Wife and her Heirs shall have the full Benefit of the Grant afterwards. If the Ten't had made a Lease *L.* Rem'r in Fee, and the Lord had granted his Services to Ten't *L.* and his Heirs, this gave him a Fee

of the Fee, (for it shall not enure by way of Ex-
tinguishment against the expre's Words, and
Purport of the Grant,) and it shall take
Effect in his Heirs by Descent, for the Inhe-
ritance of the Seigniorie was in Ten't *L.* and
the Suspension was only during his *L.*

Unity of Possession of Rent, &c. and of
the Land out of which it issues of an Estate
equally high and perdurable in both, extin-
guishes the Rent, &c. but where a Man has
a greater or more perdurable Estate in the
one than in the other, the Rent shall be sus-
pended only during the Unity of Possession,
as where his Estate in the Land is condition-
al, or gain'd by Dis'sin, &c.

If the Ten't had made a Lease *L.* saving
the Rev'n, and the Lord had granted his
Seigniorie to the Ten't *L.* the Lessor ought
to have attorn'd and by such a Grant the
Seigniorie is suspended during the Gran-
tee's *L.* but his Heirs shall have it by Descent.
And in asmuch as the Suspension is but for
Part of the Estate, it is in Being as to Things
concerning the Right; therefore if he in
Rev'n die without Heir during the Life of
the Grantee, the Rev'n shall escheat to the
Grantee; but as to the Possession, during
the particular Estate, the Grantee shall have
no Benefit as to have Rent, Ward, Relief,
&c. nor can he grant it over, because he
took it suspended, and it never was in *Esse*
in him; yet when the Lord takes a Lease
of the Tenancy, he may grant over the
Seigniorie; but when the whole Estate in
the Seigniorie is suspended, it is neither gran-
table over, nor shall the Tenancy escheat.

314.

If the Ten't had holden by diverse Services, and the Lord had granted the Seignior and the Ten't had attorn'd by paying any of the Services, this was good for the whole. So if they were granted by Fine, and the Grantee had recover'd any of 'em in a *Scire Facias* on the Fine.

No Attornment was ever requisite to a Grant to or by *K.* But my Lord *Coke* says that it was requir'd in *K.*'s Grants of Lands of the Duchy of *Lancaster* out of the County Palatine; *(a) but he has been contradicted by latter Authorities.*

(a) 1 Syd.
189.
L.v. 28.

315.

Attornment to a Grant of Rent by Payment of a Penny, was good, and gave a Seisin in Law, but Payment of Money or any Thing else in the Name of Seisin of the Rent, gave both an actual Seisin to maintain an Affise, and was also an Attornment in Law, and yet what was so paid was not Part of the Rent, nor should it be abated out of it.

Attornment made, or Seisin of Rent given by one Jointenant binds the rest. The Heir or Assignee of the Ten't might attorn, if the Ten't had died, or made an Assignment, before he had attorn'd.

An Infant was compellable to attorn in a *quod juris Clamat, &c.* but he should be to his no Prejudice thereby, for at full Age he might disclaim to hold of the Conusee, or say that he held by lesser Services.

The Attornment of an Infant, or of one Deaf and Dumb by Signs, was good. But one *Non Compos* could not attorn.

316-

If a Rev'n expectant on a Lease *T.* or Tenancy by Execution, &c. were granted, the Freehold did not pass till the particular Ten't had attorn'd. If a Rev'n expectant on a State *L.* were granted, the Ten't of the Land ought to have attorn'd, whether he were the Lessee himself, or his Assignee, for after Assignment by Lessee *L.* there is no Tenure nor Attendance betwixt him and Lessor, tho' the Assignment were on Condition only. But tho' Ten't in Dower or by Curtesy had granted over their Estates, yet might they have attorn'd, for after the Grant of their Estates, they are subject to an Action of Waste, and if the Rev'n be granted by Fine, it must suppose 'em Ten'ts, and the *quid juris Clamat* ought to have been brought against *them*, because *they were* the Ten'ts at the Time of the Note levied. But the Grantee of the Rev'n shall have Waste against the Assignee of Ten't in Dower or by Curtesy only, and must rehearse the Statute, which proves that he could not have Prohibition of Waste at Common Law, therefore it is said that the Attornment of the Assignee was sufficient.

A Rev'n or Rem'r expectant on a State *T.* could not pass by Grant without Attornment of Ten't *T.* but Ten't *T.* could not be compell'd to attorn in a *quid juris Clamat*, nor could Ten't *T. apres* but his Assignee might, and even Ten't in *T.* should be compell'd to attorn in a *per que Servitia*, or *quem redditum Reddit*.

If a Lease *T.* were made, Rem'r *L.* the Attornment of Lessee, or Rem'r Man to a Grant of the Rev'n bound the other.

317.

Rent passes impliedly by a Grant of the Rev'n, *non é converso*. If one had made a Lease *L.* and after had confirmed the Estate of the Lessee, Rem'r to a Stranger in Fee and the Lessee had accepted the Deed, this was a good Attornment, and he in Rem'r shall have Waste, if he can shew the Deed; but being privy in Estate he must shew it, and yet he has no Remedy for it during the Lessee's *L.* and when the Rem'r is executed he need not shew it; for this Cause it is the best Way to have the Confirmation in this Case by Indentures, and to deliver one Part to him to whom the Rem'r is limited.

318.

If Jointenants had join'd in a Lease, and after one had released to all the rest, or to one of 'em only, no Attornment was needful in Respect of the Privy between the Lessee, and all the Jointenants, by accepting 'em all for his Lessors; but if one Jointenant only had made a Lease *T.* and then had released to the other, the Attornment of the Lessee was requisite.

If one had made a Lease *L.* Rem'r *L.* no Attornment was needful to his Release to him in Rem'r.

If the Grant were defeasible, the Ten't was not compellable to attorn in a *quid juris*, &c. as if a Fine were levied of a Rev'n holden in *Capite* without Licence, for the *K.* might seize the Rev'n, and Rent. So if an Infant had levied a Fine, or Ten't in ancient *Demesne* had levied a Fine at Law, or Ten't in

T. had levied a Fine before 4 *H.* 7. 24. or any Ten't had alien'd in Mortmain.

If Lessor *L.* or *T.* had disseis'd or ousted his Lessee, and made a Feoffment in Fee, and Lessee had re-enter'd, this was a good Attornment, and it seems that the Law is the same if he recover in Assise, *for there is no Default in the Feoffee, and there is no Reason that the Feoffor should have his Rev'n again against his own express Grant, which passed the Feoffor's Right to the Rev'n inclusively in the Feoffment, and it would be a hard Construction to leave a naked Rev'n in the Feoffee without any Remedy to recover the Rent, &c. incident thereto.* By such Re-entry the Rent reserved on the Lease is revived, because incident to the Rev'n, but if he that has a Rent in Fee, disseise the Ten't, and make such Feoffment, it never revives.

If there be two Lessees, a Re-entry by one has the same Effect, as a Re-entry by both. Lessor *L.* grants the Rev'n for Life, the Lessee attorns, and then the Lessor disseises the Lessee, and makes a Feoffment, Lessee re-enters, this leaves the Rev'n in the Grantee *L.* and another in the Feoffee, but was no Attornment of the Grantee for *L.* of the Rev'n, because he did no Act. *Sed Q.* for if this should not amount to an Attornment, the same Inconveniencies seem to follow as in the Case above of the Lessee *L.* recovering against the Feoffee of his Lessor, who tho' he never so much disagrees to the Act of his Lessor, cannot re-con-

tinue

tinue his own Estate without attorning implicitly to the Feeffee.

If a Lease were made to *A.* for *L.* Rem'r to *B.* in *T.* Rem'r to *A.* in Fee, and *A.* had granted his Rem'r in Fee to *C.* by his Deed, it passed presently, for it would be in vain that *A.* should attorn to a Grant by himself. *Note*, When the Ancestor takes a Freehold, and after a Rem'r is limited to his Heirs, the Fee vests in him; but if the first Estate be but for *T.* it does not.

320.

If a Seigniorie or Rev'n be granted by Fine, the Thing granted is presently in the Grantee without Attornment: And he may seise a Ward, or enter into Land escheated, or for a Forfeiture; but he could not before 4 & 5 *Annæ* 16. distrain, or have an Action of Waste, or a Writ of *Consimili Casu*, or *Casu Proviso*, or of Customs and Services without Attornment, but he might have all Things which may be seised without Suit.

If Ten't *L.* had attorn'd in a *quid Juris clamat* generally he lost all Privileges, as to have the Land without Impeachment of Waste, &c. because the Writ supposes him bare Ten't *L.* but if he claim'd 'em they should either be allow'd, and enter'd of Record, or he should not be compelled to attorn. (But Attornment in *Pais* expresse or implied loses no Privilege.) The Ten't could not be compelled to attorn to a Grant by an Infant till he were of full Age because he could not till then acknowledge his Privilege. If a Mesnalty were granted for *L.* Rem'r in Fee, and the Ten't had attorn'd

corn'd in a *per que Servitia* to Grantee *L.* saving his Acquittal, and Grantee for *L.* had died, he in Rem'r could not distrain, till he had likewise acknowledged the Acquittal in a *per que Servitia* brought by him.

But if such Mesnalty or Rev'n granted by Fine had escheated before Attornment, the Lord Paramount might distrain, &c. without Attornment, for he, if he pleased, might have avow'd on the Grantee, tho' he were not compellable to do it in the Grantor's Life, and the Mesnalty came to him by Title Paramount in lieu of his former Seigniorie. But the Heir or Assignee of such Conusee could not distrain without Attornment, nor his Bargainee, or Conusee, nor his Feoffee, where he disseis'd the Lessee and made a Feoffment, and Lessee re-enter'd, for those that come to the Rev'n by the Conveyance of the Party, shall not have a greater Privilege than he from whom they claim.

321.

Co. L. 269.

No Attornment was needful where a Rev'n was extended, or granted by Fine to the Use of *A.* and his Heirs, or bargain'd and sold. For the Rev'n was settled in the Bargainee by Operation of the Statute, and he had no Remedy to compel the Ten't to attorn. And the Law is the same where Land was devised by Will, for otherwise it would be in the Ten't's Power to frustrate the Will by refusing to attorn.

322.

A Dis'sin of a Manor is no Dis'sin of the Services, unless the Ten'ts attorn to the Dis'sor, but if they do attorn, and he die seised.

feised, the Dis'see can't distrain for the Services. But tho' the Dis'sor has gotten the Attornment of the Ten'ts, they may afterward refuse to perform the Services to avoid a double Charge.

323.

No Man can be disseised of a Rent-Service in Gros, but at his Election, for if a Stranger take it by Coertion of Distress, or otherwise, yet may the rightful Owner make a lawful Grant thereof, and the Rent shall pass; or he may bring an Assise against the Stranger; or distrain the Ten't for all the Arrears, tho' the Dis'sor died feised, and tho' he has determined his Election, and admitted himself out of Possession by bringing of an Assise, as a Man may enter into Land, notwithstanding he bring an Action to recover it. And such a Dis'see may release to the wrong Doer, because thereby he admits himself out of Possession; but one can't be disseised by a bare Attornment of the Ten't to a Stranger.

324.

If a Man make a Gift in T. or a Lease L. or T. of Part of the Demesnes, and afterwards be disseised of the Manor, and all the Ten'ts, and the Donees or Lessees attorn, and after Dis'sor die, &c. yet may Dis'see distrain on the Land given or let, for as long as the Possession continues in Donee or Lessee, so long the Rev'n, and Rent incident thereto remain in Donor, or Lessor, and the devesting or revesting of the particular Estate devests or revests the Rev'n.

If the Lord of a Manor lease Part of the Demesnes, the Rev'n thereof continues Par-

cel of the Manor, and shall pass by the Grant thereof; but if he make a Lease *L.* of the whole Manor, excepting *B.* Acre, Parcel of the Demesnes, and then grant away the Manor, *B.* Acre shall not pass, for being in Possession it cannot be Parcel of the Rev'n expectant on a State of Freehold, but if the Lord had only made a Lease *T.* of his Manor, excepting *B.* Acre, it should pass by the Grant of the Manor.

325.

Of Discontinuance.

Discontinuance of an Estate in Lands properly signifies an Alienation by Ten't *T.* or one seised in *auter Droit*, whereby the Issue in *T.* Heir, or Successor, &c. are driven to their Action, and cannot enter. It may be done by 5 Sorts of Conveyances, viz. Fine, Recovery in a *Præcipe*, Feoffment, Release or Confirmation with Warranty.

Sometimes the Word Discontinuance is taken for the Plaintiff's *suffering the Defendant to be out of Court by neglecting to continue the Cause, which in an uninterrupted Series must be done from Day to Day till the End of the Suit*, and (a) this is (a) *Q. 1 Syd.* not saved by the Defendant's Appearance, ^{173.} as Miscontinuance is, *i. e.* when one Process is awarded instead of another, or a Day given which is not legal.

At Law the Alienation of Abbot, or Bishop, without Assent of Covent or Chapter, was a Discontinuance to the Successor, but if the Covent or Chapter had assented, such Alienation had been good for ever.

A Hus

A Husband might discontinue his Wife's Estate before 32. H. 8. 28. but by that Statute a Husband seisd in the Wife's Right or jointly with her, of any Freehold or Inheritance, can't discontinue it either by Feoffment, (whether made by him alone or jointly with her,) or by suffering a Recovery without Voucher,

(a) Contr²,
Moor. 28.

It is (a) said that, if after the Husband has alien'd they be divorc'd *Causa Praecontractus*, she may enter in his Life.

But this Statute saves not the Wife from being barr'd by Non-claim on a Fine levied by the Husband within 5 Years after his Death, nor does it give the Heir an Entry during the Husband's Life on the Husband's Alienee having Issue by his Wife, which would have given him a Title to have been Ten't by Curtesy if he had not alien'd. If the Husband alien Land whereof they are seisd in special T. not only the Entry of the Wife is sav'd, but likewise that of the Issue, and Rem'r Man. Nor can he discontinue a Rem'r in the Wife expectant on a State of a Freehold in himself.

But any other Ten't T. (except a Woman claiming from her Husband,) may still by Feoffment, &c. discontinue his own Estate, and the Rev'n or Rem'r depending on it; in Respect of the Privy between Ten't T. and the Issue, and those in Rev'n and Rem'r, and because an Entry would defeat the Warranty intended to be annex'd to the Feoffment, &c. and after W. 2. which restrain'd Ten't T. from aliening, he was con-

strued

trued to have such Power as the Law gave to those seisd in Fee *in auter Droit*, whose Feoffments were voidable by Action only, their Conveyances of Things in Grant were voidable by Action or Claim, &c. and their Grants of a Thing not *in Esse* before, were meerly void by their Death.

None can make the Discontinuance larger than the Alienation by Ten't *T.* made it, therefore if *A.* Ten't *T.* make a Gift in *T.* to *B.* and *B.* infeoff *C.* and die without Issue, *A.*'s Issue may enter.

He that claims by Title Paramount above the Discontinuance, may enter.

Since 11 *H.* 7. 20. if a Woman seisd in *T.* jointly or solely, of Land, &c. of the Inheritance, or Purchase of the Husband, or given to the Husband and Wife by his Ancestors, or any seisd to the Use of him or his Ancestors, discontinue, he to whom the Right after her Decease should appertain, may enter.

Co. L 316.
b.

Ten't *T.* may have a *quod Permittat*, a Writ of Customs and Services in the *Debet & Solet*, not in the *Debet* only, *Admesurement*, *Nativo Habendo*, *Escheat*, *Consimili Casu*, *Cessavit*, *Waste*. But not a Writ of Right *sur Disclaimer*, *quo Jure*, *ne injuste Vexes*, *nuper Obiit*, *rationabili Parte*, *Mortancestor*, or *sur cui Vita*, for these Writs only lie for Ten't in Fee-Simple.

A Feoffment made by Ten't in *T.* is a Discontinuance, with or without Warranty; but a Release or Confirmation is not, for a Man can pass no more thereby than he may

may lawfully pass, but Warranty added to Release or Confirmation to a Dis'sor works a Discontinuance, if it descend on him that Right has; but if one having a Son marry a 2d Wife, and Land be given to the Husband in special Tail, and he have Issue by his 2d Wife, and be disseis'd and release with Warranty and die, or if Ten't in T of *Burgh Eng.* Land, have Issue two Sons and be disseis'd and release with Warranty to the Dis'sor and die, yet is not the Entail discontinued in either Case, because the Warranty always descends to the Heir at Law.

329.

If an Abbot be disseis'd and release with Warranty and die, or resign, the Successor may enter. The Privation or Translation, &c. of a Bishop is all one with his Death, as to any Act tending to the Diminution of the Revenues, but not as to others; therefore if being Patron and Ordinary he confirm a Lease by a Parson without Dean and Chapter, and then the Parson die, and he collate another, and be afterwards translated, the Confirmation remains good *during the Lives of the Bishop and the Successor of the Incumbent who found the Land charged.*

Dy. 356.
p. 42.

The Release of an Husband seis'd in his Wife's Right to a Dis'sor with Warranty never was a Discontinuance to the Wife, unless she were his Heir.

If Ten't T. release in Fee to his Lessee T. or confirm his Estate in Fee, yet does he not discontinue the Entail, for no more passes by a Release or Confirmation than lawfully may

may. Therefore if Lessee *L.* make a Lease for Years, and afterwards make a Release or Confirmation in Fee to the Lessee, yet does he not forfeit his Estate. But if Ten't *T.* make a Feoffment with Livery, he discontinues the Entail; and if a Lessee make such a Feoffment, he forfeits his Estate. Notwithstanding such a Feoffment made by Lessee *T.* be a Forfeiture of his Estate, and a Diss'in of the Lessor, yet between the Parties it is a good Feoffment, and a Warranty may be annex'd to it.

330.

If Ten't *T.* make a Lease for his own Life, and then make a Release in Fee to the Lessee, he does not at all enlarge his Estate thereby. And if Ten't *T.* grant his whole Estate to *A.* and his Heirs with Livery, yet nothing but for his own *L.* passes as to the Issue, (*in whose Election it shall be to look on the Estate of the Grantee as void or voidable, tho' as long as it continues not defeated it be an Inheritance in the Grantee, and his Wife shall be endow'd, &c.*) but as to the Ten't himself, the Tail is in Abeyance, nor can he after bring Waste. That Ten't *T.* can't make a rightful Estate larger than for his own *L.* appears for that a Discontinuance is a Wrong to him in the Rev'n, and the Discontinuee is a *Desforceor*, and so call'd in *Formedon*.

331.

1 Saund.
26.
3 Rep. 84.

Deforcement is any wrongful Withholding of Land from the rightful Owner.

Of Things that lie in Grant there can be no Discontinuance; therefore if Ten't *T.* of a Rent, Advowson, Common, or Rem'r or Rev'n expectant on a Freehold, make a Grant by

332.

by Deed or Fine, or disseise the Ten't of the Land out of which the Rent is issuing whereof he is seisd in T. and make a Feoffment with Warranty, yet does he not discontinue the Entail. But if Ten't T. of Land make a Lease T. and levy a Fine, this is a Discontinuance, for the Fine is a Feoffment of Record, and the Freehold passes. And if Ten't T. grant a Rent or Rem'r with Warranty, and the Issue bring a *Firma don*, and admit himself out of Possession, he shall be barr'd by the Warranty and Assets.

Neither Exchanges, nor Letters Patent work a Discontinuance, because they do not require Livery of Seisin.

333.

If Ten't T. make a Lease for Life of the Lessee, he discontinues the Entail during the Life of the Lessee, and gains a new Rev'n in Fee, and if he after grant this Rev'n in Fee, and Lessee die, or surrender or forfeit in the Life of Ten't T. this is a Discontinuance in Fee because the Grantee was seisd in Demesne as of Fee, in the Life of Ten't T. by Force of his Grant; but if Ten't T. die before the Grant in Fee be executed by the Death, &c. of Ten't L. the Discontinuance determines upon the Death of Ten't L. tho' the Grant were with Warranty, (*which being annex'd to an Estate passing by Grant, cannot but be the Entry of the Issue, because the Estate to which it is annex'd is void at his Election.*) If a Fine be levied to Ten't T. and he grant and render the Land to another in Fee, and die before Execution, there

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no Discontinuance at all; or if he make Feoffment of a Part of a Manor whereof he was seised in Fee, and annex the Advowson appendant by Deed, and die before the Grant of the Advowson is executed, by presentation and Institution of a Clerk of the Grantee upon the next Avoidance, the entail of the Advowson is not discontinued. If he make a Gift in T. to B. and then release to B. and his Heirs, and die, and then B. die without Issue, the Discontinuance determines, because the Estate which passed by Livery only, caused the Discontinuance, and the Grant of the Fee was not executed in the Life of Ten't T. and if Ten't T. make a Lease L. and then grant the Rev'n in Fee to A. who grants it to B. and then Tenant L. die, whereby the Fee is executed in the Life of Tenant T. yet the Discontinuance determines by the Death of Ten't L. because the Fee was not executed in the Grantee of Ten't T. And if Ten't T. make a Lease L. and then grant the Rev'n in Fee, and the Grantee die without Heir, during the Life of Ten't L. and the Rev'n escheat, and the Ten't L. die, the Discontinuance is determined; but if the Rev'n had been executed in the Grantee before the Escheat, the Discontinuance had remained.

Litt. Sect.
642.

334.

A Lease T. by Ten't T. causes no Discontinuance, and the Rev'n on such Lease descends to the Issue in T. but the new Rev'n in Fee gained by Operation of Law upon the making of a Lease L. descends to the Heir general. A Devise by Will is no Discontinuance,

Co. L. 333. 2. continuance, nor is a Lease for 3 Lives according to the Statute, to which every one is Party, and therefore no one can be wronged by it.

If Husband and Wife at Law had by Deed joined in a Lease *L.* of the Wife's Land, this had been a Discontinuance of the Freehold, and yet the Rev'n remained in the Wife, but if the Husband alone had made the Lease, the Rev'n had been in the Husband.

335. If Donee infeoff his Donor, or Rem'r Man, this is no Discontinuance, because the Rev'n is not discontinued, for which Cause when the Rev'n is in the *K.* there can be no Discontinuance; but such an Entail, the Rev'n whereof is in the *K.* might be barr'd by Fine or Common Recovery, before *H.* 8. 20. but *K.*'s Rev'n could never be barr'd by any Act of the Ten't *T.*

If there be an intermediate Rem'r in Tail, a Feoffment made to him in Rev'n by Ten't *T.* is a Discontinuance; and if Tenant *T.* infeoff the Donor and a Stranger, this is a Discontinuance of the whole Land.

If Lessee *L.* make a Lease for his own *L.* to the Lessor, Rem'r to him and a Stranger in Fee, this enures as a Surrender for the one Moiety, and a Forfeiture for the other, *sed Q.* How the Estate *L.* can be forfeited by a Deed which the Lessor agrees to? But if one Jointenant infeoff his Companion and a Stranger, this vests his Moiety in the Stranger only, for as to his Companion the Livery is void.

If Husband of Lessee *L.* make a Feoffment

ent in Fee, and Lessor enter for the For-
 titure, this was a Discontinuance at Law
 of the Wife's Freehold, and yet the Rev'n
 was revested, *Q. How the Discontinuance*
may remain, since the Estate which pass'd
by Livery, and was the only Cause of the
Discontinuance, is defeated by the Entry
like the Lessor?

Also some Discontinuances are for Life
 only, as when Ten't T. makes a Lease for
 Years L. some are during the Limitation
 of a State T. as when Ten't T. makes a Gift
 T. but if he make a Lease T. or L. Re-
 mainder in Fee with Livery, this is a Dis-
 continuance in Fee, because the State in-
 fee passes by the Livery.

When the Estate that caus'd the Discon-
 tinuance is defeated, the Discontinuance is
 defeated also, as if the Husband had made
 Feoffment of his Wife's Land on Condi-
 tion, and died, and his Heir had enter'd for
 Breach of the Condition, the Wife might
 enter, for the Heir enter'd in Respect of
 the Title by Force of the Condition which
 descended on him, not in Respect of any
 right, and the Law will not adjudge the
 Heir to gain a wrongful Estate when he
 gets nothing but what he lawfully may.
 Therefore his Estate presently vanishes a-
 way, and vests in the Wife without any En-
 try or Claim by her.

Even at Law, if the Husband within
 Year had made a Feoffment of his Wife's
 Land, and died, his Wife might have en-
 ter'd, for he, if he had liv'd, might have en-
 ter'd, but not in his own Right, but in hers,
 there-

336.

337.

therefore such Right remains to her after his Death; for it is hard that the Husband's Feoffment, which would not take away his own Entry, should take away hers; but the Husband's Heir in such Case could not enter, because no Right nor Title descended to him; and if an Infant being Ten't *per autre Vie* make a Feoffment, he can't enter after the Death of *Cestuique Vie*, because then he has no Right at all remaining in him. If Baron and Feme being both within Age join in a Feoffment by Indenture of the Wife's Land, reserving Rent, and he die, she may have a *dum fuit infra Ætatem* but if he were within Age and she of full Age, she shall not.

If two Infants being Jointenants make Feoffment, and one die, the Right survives, because they might have join'd in a Writ of Right, and the Survivor may enter into the whole, but they can't join in a *dum fuit infra Ætatem*, because that Action is grounded on the Nonage of the Demandant which is several, for the Nonage of the one is not the Nonage of the other. But if one of them only had made a Feoffment of his *Moiety*, the Jointure had been severed while the Feoffment had remain'd in Force, and consequently there could have been no Survivor, but if he had made a Feoffment of the whole Land, and died, the Right would have surviv'd, because they might have join'd in a Writ of Right. If one Jointenant be within Age and the other of full Age, and they join in a Feoffment, and

(a) 8 Rep.
43. a.

er after full Age die, the Infant shall recover but
 husband's Moiety.

away but Not only the Heir general shall take Ad-
 but the vantage of the Nonage of the Ancestor, but
 l not c so a special Heir, as the Heir by the Cu-
 escende om of *Burgh Eng.* or Heir in special *T.*
 en't p ho' he be not Heir at Law. If the Hus-
 can't e and had made a Gift in *T.* of his Wife's
 Vie, b and during his Nonage, and died not on-
 remain y the Wife might have enter'd, but the
 ing bo heir of the Husband in Respect of the new
 y Inde lev'n in Fee, *created by Construction of*
 g Rem *law upon the making of the Gift in T.* but
 fin is is Estate presently vanishes. If an Infant
 in Age en't *T.* had made a Feoffment, and been
 s make eintained and died, the Issue in Respect of
 ight fu he Corruption of Blood, was put to his
 in'd in *formedon.*

A Woman being an Heiress marries, and
 as Issue, the Husband dies, she marries
 in a d gain, the 2d Husband makes a Lease *L.*
 Action her Lands, the Wife dies, the Lessee sur-
 andum renders to the Husband, it seems that the
 of the o due of the Wife may enter upon the 2d
 But if o husband, because the Estate *L.* which
 ent of eus'd the Discontinuance is drowned and
 n severe nish'd by the Surrender, but after the
 in For eath of Lessee *L.* there is no Doubt but
 e been e Issue may enter.

A Surrender is the Yeilding up of a State
 Feoffme or *T.* to him that has the immediate
 the Rig lev'n or Rem'r, wherein the Estate *L.* or
 ey wigh ev'n or Rem'r, wherein the Estate *L.* or
 one Jo may drown. A Surrender is either in
 er of f deed or in Law; a future * Interest for *T.*
 t, and cannot be surrender'd by Deed, but it may
 surrender'd in Law, as if Lessee for ten

Contra:
 8 Rep. 43;

338.

* Dyer, 58.
 pl. 3. cont.

U

T. to

T. to begin at *Michaelmus*, take a new Lease, for thereby he as much acknowledges the Lessor's Power to make a new Lease, notwithstanding his Interest, as if he were Ten't in Possession, and had taken a new Lease, but there can be no Surrender of a bare Right. A particular Estate in Things lying in Livery, which might at Law pass without Deed, might before 29 Car. 2. 3. be surrender'd by Parol without Deed, whether it commenc'd by Deed or without; but Things that lie in Grant, or a Rem'r of an Estate in Land could never be surrender'd without Deed, whether the particular Estate began with or without Deed.

Tho' the particular Estate be drown'd by the Surrender as to the Party, yet as to Strangers it continues *in Esse*, for *res inter alios acta alteri nocere non debet*; therefore if the Rev'n be granted with Warranty, and then Ten't *L.* surrender, the Grantee shall not have Execution in Value against the Grantor during the Life of Ten't *L.* nor shall the Surrenderee being an Infant have his Age; nor shall a Rent granted by Ten't *L.* be avoided by a Surrenderee during the Life of Ten't for Life.

If one grant a Rent-Charge out of his Land to a Bishop, and afterwards infeof the Bishop of the Land, and then the Lord enter for the Mortmain, he shall hold the Land discharg'd of the Rent, for he affirms the Alienation in Mortmain, and claims *in Respect thereof the same Estate as the Bishop had*. But if Ten't *L.* grant a Rent, and in

Lease, the Lessor enter for the Forfeiture, the Rent is reviv'd, for the Lessor re-entring, defeats the Estate of the Alienee, the Making whereof devested his Rev'n, and claims such Estate as his Ten't had before the Alienation which was liable to the Rent. The Grant of a Rev'n for L. makes the Waste dispunishable, but if the Grantor release to the Grantee and his Heirs, the Waste becomes punishable again.

The Estate surrender'd is in some Respects absolutely drown'd for a Stranger's Benefit, and a Lease or Grant by him in Rev'n shall after such Surrender take effect presently. A. makes a Lease L. reserving 40 s. Rent, Rem'r to B. and then grants the Rev'n in Fee to B. and A. attorns, B. shall not have the Rent: But this seems not to be Law, for 'tho' the Estate surrender'd in some Respects is look'd upon as subsisting, lest a Stranger should be wrong'd by the Surrender; yet what Wrong can it be to him in the Case to pay the Rent originally reserv'd? Lit. Sec. 575.

If Lessee Y. of Land in his own Right take a Wife seisd of the Freehold, or become Parson of the Church, &c. to which the Freehold belongs, his Term for Y. is drown'd; for a Man can't at the same Time have the Freehold, and a Lease Y. in the same Land; but the greater Estate drowns the less: Yet if a Man marry his Lessee Y. the Term for Y. remains; for the Wife, in whose Right he was possess'd thereof, has nothing to do with his Freehold, and the Law in Favour of the Wife, will preserve her Lease. If Lessee Y. of a College be made Head thereof, this drowns not the

Lease *T.* because the Freehold vests not in him, but in the Corporation.

339.

None can discontinue a State *T. &c.* unless he once were seisd by Force of the Tail, &c. unless it be in respect of a Warranty; which being made to a Feoffee, or Diss'or, and descending to the Heir, had the Effect of a Discontinuance in taking away the Entry of the Heir, before 4 & 5 Annæ 16. by which all Warranties made by them who have no Estate of Inheritance in the Land, &c. shall be void against the Heir. And where no greater Estate passes than for *L.* of Tenant in *T.* as in Grants of Rev'ns, &c. a Warranty added, whether by Ten't *T.* or any other Ancestor, never caused any Discontinuance.

340.

But such Feoffments and Grants made by them, who never were seisd by Force of such Estates, are good against the Grantors during their Lives.

341.

An Alienation by Parson or Vicar of the Land of the Church never was a Discontinuance, for these have not the Right of the Fee in 'em; but the Fee remains in Abeyance, *i. e.* in *consideratione Legis*, and *non in homine adtunc superstite*: When a Lease *L.* is made, Rem'r to the right Heirs of *J. S.* then living, the Fee is in Abeyance during the Life of *J. S.* So the Freehold of the Glebe is in Abeyance during the Vacancy of a Parsonage: And so is the Freehold of the Land of a Bishoprick during a Vacancy; and the Freehold of Land giv'n to *A.* for *B.*'s Life, was in Abeyance, by the Death of *A.* till an Occupant enter'd.

Co. L. 342.
b.

Vid. Supra,
59.

But

But a Parson, Vicar, Archdeacon, Prebend, &c. are esteem'd in some Cases to have a Fee qualified for the Benefit of the Church, for they may have a Writ of Waste, or Entry in *consimili Casu*, or *ad communem Legem*, or *ad terminum qui præterit*; or a *quod permittat*, or a *contra formam Feoffamenti*. or a Writ of mesne; none of which Writs Ten't *L.* can have. But a Lease *T.* made by them is void by their Death, and they shall have Aid of Patron and Ordinary, so that to such Purposes they have but a State *L.*

But a Bishop, Abbot, Dean, and Master of an Hospital, seeing the Fee and Right was in 'em, and they might maintain a Writ of Right, might at Law discontinue the Land whereof they were solely seisd. But they shall not have Aid, in respect of their high Estate, except a Dean collative by *K.* who shall have Aid of him.

It has been resolv'd, that no Lay Hospital is within the 31 *H. 8.* of Monasteries, but only those that were Religious and Ecclesiastical; and tho' it were ordain'd, on the Foundation, or after, that divers Priests should be maintain'd in it, to celebrate Divine Service to the Poor, and pray for Souls, yet such Hospital is Lay; and no Hospital came to the Crown by 1 *Ed. 6.* whether Lay or Religious.

Nor will it follow that a Parson, &c. hath a Fee, because the Grant of an Annuity by Parson confirm'd by Patron and Ordinary, or made by Patron in Vacation, and confirm'd by Ordinary, or made by Parson ha-

ving *quid pro quo*, and confirm'd by Ordinary only, would at Law bind all Successors for ever: For it is a Maxim, that of all Land there is a Fee, either in some Person or in Abeyance; and that every Land in Fee may be charg'd with a Rent in Fee one way or other; and such Grant is Good, because made by all that have Interest: But where the Fee is not perpetually in Abeyance, but may every Hour possibly come in *Esse*, it can't be charg'd till it come in *Esse*, as when a Rem'r is giv'n to A.'s Heirs, it can't be charg'd in H.'s Life.

Vid. Supra,
6. 80.

A Grant of Rent by Ten't *T.* shall never be avoided, if the Entail be cut off: Nor shall his Issue avoid it, if it be granted to one whom the Donor disseis'd in Consideration of a Release of his Right. Where one has 13 Acres in a Meadow of 80 yearly to be set out, and grants Rent out of those 13 Acres generally, lying in the Meadow of 80 without mentioning where they lie particularly; there as the State removes, the Charge shall remove.

344.

Not only a Prebend, Chantery, and Chapel, but also a Church Parochial may be Donative, and exempt from all ordinary Jurisdiction, and the Incumbent shall resign to the Patron, and he shall be visited by him only, but he must be an able Cleric *infra sacros Ordines*; and if he be disturb'd the Patron shall have a *Quare Impedit*, and the Writ shall say, *Quod permittat ipsius presentare ad Ecclesiam*, and the Declaration shall shew the Special Matter. No Lay

shall incur to the Ordinary on the Patron's neglecting to collate, except it be so specially provided in the Foundation: *But the Ordinary may compel him to fill the Church by Church-Censures.* One Presentation by the Patron, and Institution thereon, make it presentable for ever. But Presentation by a Stranger, and Institution thereon, are void.

Bishopricks at first were donative *per Traditionem baculi & annuli*: K. John granted that they should be eligible. A Church, Hospital, or Free Chapel, founded by K. without any Special Exemption, is visitable by the Chancellor only; and K. may licence a Subject to found such Church, &c. and to ordain, that it shall be donative, and visited by the Founder.

Admission is, properly, when the Bishop admits one examined by him to be able; sometimes it is taken for Institution, as where it is said, *Cujus presentatus sit admittus*, i. e. *Institutus*. Institution is when the Bishop says these Words, *Instituo te rectorem talis Ecclesiæ cum curâ animarum & accipe curam tuam & meam.* But it is said, that every Institution implies that the Person instituted has the Cure of Souls, tho' the Words *Accipe curam tuam & meam*, are not in the Instrument of Institution, and tho' the Parson has a Vicar endow'd. A Church is full by Institution against a Subject, but not against K. till Induction, for which Cause K. may revoke a Presentation before Induction.

U 4

Whether

Whether a Church be full, shall regularly be tried by the Bishop's Letter, because Institution is a Spiritual Act; but whether it be void, shall be tried by the Common Law.

At Law, Plenarty was a good Bar to a *Quare Impedit* brought by any but K. and no Clerk once instituted could be removed at the Suit of any but K. so great Regard had the Law to the Bishop's Institutions nor could K. himself present after Induction, or remove the Clerk but by Action. And at Law an Usurpation, even on an Infant or Feme Covert, having an Advowson by Descent or Purchase, or on Ten't L. &c. put the Infant and Feme Covert, and those in Rev'n to their Writ of Right: But by 7 2. A. no Usurpation shall drive the Patron to a Writ of Right of Advowson.

Usurpation by Collation puts him that has Right of Collation out of Possession; but one that has Right of Presentation can't be put out of Possession by Collation, but the Collation shall be intended to be made by the Bishop provisionally till the Patron presents, and shall not drive him to his *Quare Impedit*.

By W. 2 an Incumbent may be removed by *Quare Impedit*, tested within six Months after the Plenarty; but the Incumbent must be nam'd in it, or he shall never be removed. And at Law no Incumbent could be removed; but if the Patron had brought his *Quare Impedit* before the Church had been full, he should have had a Writ to the Bishop, and should have removed any Clerk that

that came in *pendente lite*, by Usurpation; but if one who has no Right bring a *Quare Impedit*, and the rightfull Patron being a Stranger to the Writ, Presents, and his Clerk be receiv'd, he shall never be remov'd. Vid. Watson 217.

If the Bishop be nam'd in a *Quare Impedit*, there can be no Lapse,

If Ten't *T.* release all his Right to a Disfeisor, or grant all his Estate to another, he (a) puts the Right of the Entail in Abeyance; so if he be attainted of Felony, and K. after Office seise the Land, or if he in Rem'r in *T.* release to Ten't *L.* all his Estate and Right in the Land; and it seems that in this last Case Lessee *L.* shall have an Estate for Life of Ten't *T.* Expectant on his own Life, and in none of these Cases the Grantor or Releaseor shall have Waste afterwards: But tho' Ten't *T.* make a Lease for his own Life, or Ten't in Fee release all his Right to his Lessee *L.* he may have Waste. (a) Contra 2 Roll. Rep. 505, &c.

Estate and Interest are collective Words; for if *A.* be Ten't *L.* Rem'r in *T.* to *B.* Rem'r in Fee to *A.* and *A.* grant *totum statutum*, or *totum interesse suum*, both his Estates pass.

Right signifies properly in Writs and Pleadings, when an Estate is wrongfully divested, and turn'd to a Right; but in Conveyances it includes the Estate *in esse*, as when a Lessor releases all his Right to his Lessee and his Heirs; and in Fines the Right of the Land includes and passes the Estate of the Land, as when *A. cognoscit tementa predicta esse jus ipsius B.* &c.

Title is properly, some say, when a Man has a Cause of Entry, for which he can have no Action; but legally it includes Right, and is the more general Word; Release of Right releases a Title; so *à converso*. It often signifies the Means by which one comes to Land, as Fine, Feoffment, &c. as when 'tis said, *Veniat assensum super titulum*, i. e. the Conveyance by which the Plaintiff claims.

346.

A Feoffment by a Bishop, or Dean solely seised, was at Law a Discontinuance; but a Dean could never discontinue the Land whereof he was seised in Right of himself, and his Chapter; for of such Lands he and the Chapter must join in Suit, and his Feoffment of such Land is a Diss'in: But an Abbot might discontinue the Land of his House, for all the Monks were dead in Law, and he only had Capacity to sue, and be sued, to infeoff, give, demise, &c.

347.

A Master of an Hospital solely seised might have discontinued; but one seised together with his Brethren, as a Body Politick aggregate, never could.

He in Rem'r T. disseises Ten't L. and makes a Feoffment, and dies without Issue and Ten't L. dies, he in Rev'n may enter for the Rem'r Man was never seised of the Freehold and Inheritance by Force of the Tail.

Of Remitter.

Remitter is an Operation of Law upon the meeting of an old Right remediable, and a latter defeasible Estate in the same Person without his Folly; whereby the former is restored, and the latter defeated: For the Law prefers a sure Right, tho' but to a small Estate, to a great defeasible Estate.

But there shall be no Remitter to bare Titles of Entry, nor can there be any Remitter but by the Descent of an Estate; therefore if an ancient bare Right descend to one who has a latter Right, yet is he not remitted.

348.

If Ten't *T.* disseise his Discontinuee, and have Issue, and die, his Issue is remitted by the Descent of the Freehold in Law before he enters, tho' the Discontinuee be an Infant or Feme Covert.

As in the last Case there is a Remitter where the defeasible Estate and old Right descend together, the Law is the same, where Ten't *T.* enfeoffs his Issue within Age, and the Right of the Entail after descends to the Feoffee, whether within Age, or of Age at the Time of the Descent; and notwithstanding he might have waived the Estate gained by the Feoffment after he was of full Age, yet shall he be remitted, because such Waiver would have been to his Loss, and no Folly could be imputed to him when he took the Estate.

Vid. infra.

460.

And

349.

And if the Issue in *T.* infeoffed by his Father, grant a Rent or Common out of the Land, and then the Right of the *T.* descend to him, he shall hold the Land discharged; for the State which he had when he made the Grant, is utterly defeated. So if the Dissee's Heir disseise the Dissee, and grant a Rent, and then the Dissee die, the Land is discharged; for the Heir is remitted, because a new Right of Entry descends to him. Father disseises Grandfather, and grants a Rent, and dies, Grandfather dies, the Son is remitted, and shall avoid the Rent; *nor can the Grant in these Cases enure by way of Estoppel, because an Interest passed from the Grantor:* But in these Cases the Grantee may have a Writ of Annuity against the Grantor, * *and his Heirs if mentioned in the Grant*; but it seems that if the Issue in *T. &c.* had made a Lease *T.* it should not have been avoided by the Remitter.

Vid. Lit.
Sect. 693.

Co. L. 45
2.

* Co. L.
144. b.

Litt. Sect.
189.

If Ten't *T.* make a Lease *L.* and then grant a Rent in Fee, and Ten't *L.* die, yet the Rent remains; for tho' the Rev'n in Fee gained by the Discontinuance be defeated yet because the Grantor at the Time of the Grant had the Right of the Entail in him, tho' he were not then seised by Force thereof, the Rent remains good against him.

Co. Lit.
348. b.

At this Day if Ten't *T.* make a Feoffment to the Use of his Issue, and die, the Issue shall not be remitted, because the Statute of Uses says expressly, That *Quicunque Use* shall have the Estate of the Land in such Quality, Manner and Form

as he had the Use; but the Issue in *T.* in that Case, may waive the Possession, and recover in a *Formedon* against the Feoffees, for otherwise the Land might be so far incumber'd by the Ten't *T.* that it would be nothing worth to the Issue; and tho' the Parry himself that comes to the Land by Force of the said Statute of Uses, cannot be remitted, yet if he die, and the Land descend to his Issue, he shall be remitted, for the Land comes to him as Heir by Course of Common Law.

The chief Cause of Remitter is, because there is no Ten't of the Freehold, but the same Person that has the Right, and he can't sue himself; therefore the Law judges him to be in such Plight, as if he had recovered against another.

There can be do Remitter to him that has an Action without Right, as the Issue of Ten't *T.* who has suffered a Common Recovery in which there is Error. Nor to one that has a Right without an Action, as if *B.* purchase an Advowson, and suffer an Usurpation, and six Months to pass, and the Usurper grant the Advowson to *B.* and his Heirs, and *B.* die, yet is not his Heir remitted; *for he cannot have a Writ of Right of Advowson, because neither he nor his Ancestors ever presented; but it seems that there shall be a Remitter in this Case by 1 Q. A. which gives the Patron a Quare Impedit, notwithstanding an Usurpation.*

A Man can't be remitted to a Thing regardant, appendant, or appurtenant, until he have re-continued the Principal, for he can have

349. *B.*

have no Action to recover the Thing appendant, &c. till he have recover'd the Principal; therefore if the Discontinuee of a Manor to which, &c. grant the Advowson to Ten't T. and his Heirs, and he die, yet is not the Issue remitted. But a Remitter to the Principal is a Remitter to the Appendant, tho' they were severed before the Remitter; as if the Discontinuee grant the Manor to Ten't T. and his Heirs, saving the Advowson, and Ten't T. die, and the Manor descend to the Issue, he is not only remitted to the Manor, but to the Advowson also: So if a Dis'sor suffer an Usurpation, and Dis'see re-enter into the Manor to which, &c. he re-continues the Advowson.

350.

If Ten't in Special T. have Issue a Daughter, and his Wife die, and he marry again, and have Issue another Daughter, discontinue, and take back a State in Fee, and die, and the Land descend to the two Daughters: Or if Ten't T. infeoff his Heir apparent within Age, and a Stranger, and die; or if a Discontinuee, after Death of Ten't T. infeoff the Issue within Age, and a Stranger: in all these Cases there is a Remitter to no more than a Moiety, and the Issue in T. and the other become Ten'ts in Common.

If Ten't T. infeoff his Heir apparent of full Age, and die, the Heir shall not be remitted, because it was his Folly to take such Feoffment.

351.

If Ten't T. infeoff a Woman of the Land entail'd, and die, and his Issue being within Age marry the Woman, he is presently re-

mitted

mitted by the Freehold in the Wife's Right, which he gains by the Intermarriage; and yet the Freehold in the Wife's Land giv'n by Marriage to the Husband, is so uncertain, that it shall be lost by the Wife's Attainder before Issue had, and consists so much in Privy, that by the Attainder of the Husband for Felony, the Lord gains but a Pernancy of the Profits during the Coverture, and the Freehold remains in the Wife.

The Husband is possess'd of all his Wife's Chattels Real in her Right, and if he survive her, he shall have them by Gift of Law in his own Right; and he may grant, demise, forfeit, or sell 'em in his Wife's Life, but he can't dispose of 'em by Will: The Wife surviving him, shall avoid a Rent-Charge, &c. granted by him, but not a Demise made by him for Part of the Term.

It seems that such a Chattel of the Wife's may be sold by the Sheriff in the Wife's Life, on an Execution of a Judgment in Debt against him.

Chattels Real or Personal which the Wife has *in autre Droit*, as Executrix or Administratrix, shall not survive to the Husband: And if she grant a Term to her Use before the Coverture, or have a meer Possibility, the Husband surviving her, shall not have it, but her Executors or Administrators.

If she 'be dispossessed of a Term before Marriage, or have a Right to any Chattel Real or Personal, or have an Action of Debt on a Bond, the Husband shall have no Benefit

Benefit of 'em unless he recover during the Coverture.

But the Husband surviving, shall have such Chattels as are partly in Possession, and partly in Action, which happen during the Coverture, as Arrears of Rent of any Kind becoming due after the Marriage; but he could not recover any Arrears due to the Wife before the Coverture, until 32 H. 8. and they shall remain with the Wife surviving the Husband, whether due before or after Marriage.

Vid. *supra*,
251.

If a Church become void during the Coverture, he shall have a *Quare Impedit* in his own Name, as some hold, but if the Wife survive, she shall present, and the Husband, if he survive, shall present to a Church void during the Coverture; but not to one void before.

The Wife's Chattels Personal in Possession, are absolutely given to the Husband by the Marriage.

But if he die before he seises an Estray in her Manor, she shall have it, for there was no Property in her before Seizure. Where she has but a bare Possession, as if she find Goods, or they be bailed to her, or she be Executrix to a Bailee, and marry, Detinue must be brought against the Husband and Wife.

352.

If the Husband make a Feoffment of the Land whereof the Wife is seisd in Fee, and the Feoffor let the same to the Husband and Wife for their Lives, this is presently a Remitter to the Wife as to the whole Land, for she cannot be remitted to a Moiety only because

because there are no Moieties betwixt Husband and Wife, and no Folly shall be adjudg'd in the Feme Covert for taking back the Estate *L.* for it shall be adjudg'd the Act of the Husband, and not of the Wife; and the Law is the same, tho' the said Lease were by Indenture, or by Grant and Render in a Fine; and yet if the Lessor bring an Action of Waste against the Husband and Wife, the Husband shall be estopp'd to shew the said Matter against his own Act in making such Feoffment, and taking back the said Lease *L.* but if he make Default at the Grand Distress, and the Wife be receiv'd, she may plead all the said Matter, and bar the Lessor, for a Wife receiv'd for the Husband's Default, shall have the same Advantage in Pleading, as if she were Sole, and in some Cases more, as if she be receiv'd in Affine, and vouch a Record, and fail thereof *the Day given to bring it in*, she shall not be adjudged a Diss'or, *which would make her liable to double Damages, and a Year's imprisonment, for the Law pities the Weakness of a Woman unassisted by her Husband in making her Defence.* So if she alone levy a Fine executory, and in a *Scire Facias* against her and her Husband she be receiv'd in his Default, she shall bar the Conussee, which if sole, she could not do. *For since the Husband, if he had appear'd, might have barr'd the Conussee, the Wife on his not appearing shall plead the same Matter.*

When the Husband levies a Fine of the Wife's Land, and the Conussee grants and renders

353-

W. 2. 25:

Co. L. 46. 2.

renders to 'em both, the Wife not being Party to the Original, nor Conusance, can take no good Estate, but by Way of Remitter yet she does take a present Estate voidable for if it were void it could not work a Remitter. The Reason why the Wife shall not be concluded by taking the State in Fine is, for that she is not examined when In the Fine she only takes an Estate, but where she parts with any Right she is to be examined, because thereby she shall be barr'd for ever. Therefore if the Husband and Wife Ten'ts in special T. levy a Fine and take back a State in Fee, she shall not be remitted against the Fine levied by her but the Issue should, before 4 H. 7. 24. &c.

Co. L. 352.

An Estoppel is where a Man by his own Act or Acceptance is concluded to allege the Truth; it may be, 1st, By Record, Letters Patents, Fine, Recovery, Plea, Taking of a Continuance, Confession Imparance, Warrant of Attorney, Admittance, 2d, By Matter in Writing, as an Indenture, or Deceasance, or an Acquittance by Deed indented, or Poll. 3d, By Matter in Pleading, Livery, Entry, Partition, Acceptance of Rent, or Acceptance of an Estate; as in the Case above, where the Husband accepts an Estate from his Feoffee, for the Life of himself and his Wife.

As to Estoppels, observe these Rules

1. They ought reciprocally to bind both Parties, therefore, regularly they extend not to strangers; but Privies in Blood, the Heir; Privies in Estate, as the Feoffee, Lessee, &c. Privies in Law, as the Lord.

Esche

Escheat, Ten't in Dower, or by Curtesy, incumbent of a Benefice, and others, that come under the Estate of him that was Party to the Act which Causes the Estoppel, shall be bound and take Advantage thereof, and a Rebutter is a Kind of Estoppel.

Vid. *supra*,
77.

2. That which causes the Estoppel, ought to be certain to every Intent, and directly contradictory to the Matter which it concludes a Man to alledge; nor is it sufficient that it may be prov'd so by Argument.

3. It must be by something precisely affirm'd, therefore what is spoken Imperfectly or by Way of Rehearsal, shall never work an Estoppel.

4. A Matter alledged that is neither traversable nor material, shall not be an Estoppel; for it would be hard to take from a Man his Right for want of Caution in his Expressions of Matters of so little Consequence.

5. Regularly a Man shall not be concluded by Acceptance of Rent, &c. before his Title, in Respect whereof he might defeat the Estate whereon it was reserv'd, is accrued to him, for a Man cannot be said to waive what he has nothing to do with.

6. Estoppel against Estoppel puts the Matter at large.

7. Matter alledg'd by Way of Supposal in Counts, shall not conclude the Plaintiff after Nonsuit, because it is not precisely alledg'd by him, and by suffering a Nonsuit, he shews that he doth not insist on the Truth of it; but it is otherwise after Judgment given; and all other Pleadings of either Party

Party which are precisely alledg'd, shall conclude after Nonsuit.

8. Where the Truth appears in the same Record, the adverse Party is not estopped to alledge it. Therefore, tho' a Fine levied without an Original be only voidable, yet if an Original be brought, and a Retrax entered, the Fine levied afterward is void because the Truth appears of Record. A Church is appropriated to a Bishop and his Successors after the Death of an Incumbent; the Bishop by Indenture makes a Lease of the Parsonage to begin after the Incumbent's Death; this never was any Estoppel *because it appears in the Demise it self, that the Bishop could have no Estate in Possession or Rev'n, of the Parsonage, during Life of the Incumbent, who was seisd thereof in Fee at the Time of the Lease, and therefore it must needs be void.*

9. All Strangers shall take Benefit of Records which run to the Disability or Legitimation of a Man's Person, as Outlawry, Attainder, &c. and *Bishop's Certificate of Profession, Excommunication, Bastardy, &c.*

If the Bishop certify a Bastard Eigne to be a Mulier, the adverse Party may contest and avoid, by alledging the special Matter.

If Ten't T. discontinue, have Issue a Daughter, and die, and the Daughter marry, and the Discontinuee make a Lease to her Husband and Wife, she is remitted, tho' she were of full Age when she married, for the Remitter is favoured in Law; but if

Femal

me Dis'see take a Husband, a Descend
it takes away her Entry.

If Husband and Wife be Ten'ts in spe-
al *T.* and he discontinue and take back a
ate *L.* to himself, and his Wife, both of
em are remitted maugre the Husband;
there being no Moieties between 'em, she
ust be remitted to the whole, or not at
rd. , and she can't be remitted unless he be
mitted also.

As the Discontinuance or Devesting of
e particular Estate displaces all Rev'ns and
em's expectant thereon, so the Reconti-
ance of the particular Estate reverts the
ev'ns and Rem'r's, and defeats all defeasi-
e Estates in the same Land, not only out
a common Person, but also *K.* himself;
if *B.* be Ten't *T.* with Rem'r to *C.* and dis-
continue, and take back a State in *T.* with
em'r to *K.* by Deed inroll'd, and die, his
ue being remitted, the Rem'r is revested
C. and the Law is the same where Land
recover'd by good Title against Ten't
or *L.* where the Rem'r is in the *K.* but
ortious Entry, or false, or feign'd Recove-
shall never devest a State out of the *K.*
But if there were Ten't *L.* Rem'r in *T.*
B. Rem'r in Fee to *C.* and Ten't *L.* had
en disseis'd, and a collateral Ancestor of
had released to the Dis'sor with Warran-
before 4 & 5 Anne 16. and died, and
en't *L.* had enter'd, yet should not *B.* be
mitted to the State *T.* because his Right
it was Remediless, while the Warranty
continued in Force, therefore the Dis'sor had
Fee determinable on *B.*'s Dying without
Fem'ue, and the Rev'n was revested in *C.*

If

If a Fine *sur* grant and *rend'* be levied for *L.* or *T.* with Rem'r over, the Execution of the first State executes the Rem'r.

355.

If Feme Lessee *L.* lose by Default in feign'd or false Action, the Lessor's Reversion is devell'd, and he can't bring Waste *recovery* *the Recovery continues in Force*; but if the Feme marry, and the Recoverer make Lease *L.* to the Husband and Wife, the Wife is remitted, and the first Lessor also, and then he may have an Action of Waste. But if the Recoverer bring Waste against the Husband and Wife, the Husband has no Remedy but to make Default, and suffer the Wife to be receiv'd. The Cause why the Wife is remitted in this Case is for that she may have a *quod ei desorceat* against the Recoverer by *W. 2. 4.* which gave this Writ to Ten't *L.* and *T.* losing by Default, but at Law her Right was Remediless, and consequently she could not be remitted.

356. a.

By the Equity of the said Statute, if the Wife be Lessee *L.* and the Husband and Wife lose by Default, they shall have a *quod ei Desorceat*, tho' the Statute speaks of Ten't *L. &c.* and the Husband is not Ten't *L.* but only seisd in the Right of the Wife. But if Husband and Wife lose by Default, and the Husband die, the Wife shall not have this Writ, for a *cui in Vita* given her in that Case, by *W. 2. 3.*

It has been questioned whether a *quod ei Desorceat* lies upon a Recovery by Default in an Action of Waste against Ten't Dower or by Curtesy, and it seems that it doth; for tho' the Judgment be not given

ly on the Default, and the Defendant may give Evidence to the Jury which are to require on the Writ *de Vasto Facto* awarded on the Default, and the Jury may find no Waste done, as they may find against the Plaintiff when an Affise is awarded by Default, yet the Default is the principal Cause of the Judgment; and the Statute is beneficial, and therefore shall have a favourable Construction; and it is presum'd that the Defendant who loses by Default knows not against it; and the Wife shall be received on her Husband's making Default in such Action, and shall have a *cui in Vita* on a Recovery against her Husband by such Default, by Force of *W. 2. 3.* yet the Words of that Statute likewise are *per Desaltam*, &c. and a Writ of Deceit, which only lies on a Recovery by Default, lies on such a Recovery; and a *quod ei Deforceat* lies where an Affise is awarded by Default, and the Jurors find for the Plaintiff, in which Case it is evident that the Judgment is not given on the Default only. So if he in Rev'n be received on Default of Ten't *L.* and plead to the Issue, and it be found against him. Ten't *J.* shall have the Writ, and yet the Verdict of the Plaintiff against him in Rev'n, as well as the Default of Ten't *L.* is the Cause of the Judgment.

Vita As to the Objection, That this Writ lies only where no Attaint lies, the Answer is (1) 2 Cro. quod plain. 1. No (a) Attaint lies in this Case, C. 414. because tho' the Verdict be found by the Oath of 12 Men, yet the Jurors are not liable to an Attaint, because it is but an Inquest of Office, i. e. not found in a Court of Record

Record on an Issue there join'd, but only found before the Sheriff, in order to inform the Court of some Particulars, without the Knowledge whereof they can't proceed.

An Attaint lies on Recovery by Default in Affise, and also a *quod ei Deforceat*.

As to the Objection, that this is a personal Action, it is true that at Law in Waste against Ten't in Dower, &c. Damages only were recovered, yet since the Statute of *Glocester*, the Place wasted is to be recovered, and therefore the Damages are not now the Principal, for *omne magis dignum trahit ad se minus dignum*, and the Damages may be releas'd, and the Place wasted only recovered, which could not be if the Damages were the Principal: And tho' in Waste in the *Tenuit* by Jointenants against one who was their Ten't. the Release of one bar the other, yet in an Action of Waste in the *Tenet*, whether against Lessee *L.* or *T.* the Release of one bars not the other.

356.

Every Writ of Waste must suppose that the Waste was done *ad Exheredationem* of the Plaintiff, and the Inheritance must continue at the Time of the Writ. A Lessee may plead *Riens in le Rev'n* generally against a Grantee of the Rev'n, but not against his Lessor, but he must shew how it was devested.

Yet if Lessee *L.* make a Feoffment on Condition, and the Feoffee do Waste, and Lessee re-enter, or if a Dis's'or of Lessee *L.* do Waste, and Lessee re-enter the Lessor may have an Action of Waste against the Lessee, tho' the Rev'n was not in him when

the Waste was done, for when it is revested, he is restored to it in such Plight as if it had always continued in him, and it was the Lessee's Fault to suffer the Waste to be done, so if a Lessee L. of Land belonging to a Bishop do Waste during the Vacancy, the Successor may have Waste against the Lessee.

Vid. 2 Inst.
158.

N. B. Tho' the Discontinuance were by Matter of Record, the Remitter may be by Matter in *Pais*.

If the Husband make a Feoffment of the Wife's Land, and take back an Estate to himself and Wife and a 3d Person, the Wife is remitted but to a Moiety.

If the Husband make a Feoffment of the Wife's Land, and go beyond Sea, and she take a State of Freehold in his Absence, and when he comes back agree to it, this is certainly a Remitter. And it seems also that it is not in the Power of the Husband when he comes back by any Disagreement to the Estate to prevent the Remitter, for it was a Remitter presently, and the Husband can't devest the State made to the Wife, which was devested by the Remitter before, and the rightful Estate being restored, it is not in his Power to revive the Wrong. Nor can the Wife after his Death avoid being remitted.

But if both Estates had been originally conveyable, there tho' *Primâ Facie* she be remitted, yet after the Husband's Death, she may elect which of 'em she will. As if she had been given to Husband and Wife in Fee, and he make a Feoffment, and take

357.

back a State in *T.* after his Death she may chuse either Estate.

Ten't in *T.* Female discontinues, and takes back a State in Fee, and dies, leaving a Daughter and *Privement Enseint* with a Son, the Daughter is remitted, nor shall the Son born afterward develope it.

If the Husband make a Feoffment of the Wife's Land, and the Feoffee be disseis'd, and the Dis'sor let the Land to the Husband and Wife for *L.* this is a Remitter to the Wife, tho' the Dis'sor was a wrongful Doer, and the Entry of the Feoffee was lawful on him. But if the Wife were of Covin that the Dis'sin should be done, she shall not be remitted: For tho' she can't be a Disseisorefs by her Command Precedent, or Agreement Subsequent, but by her actual Entry or proper Act only, yet it is holden that her Procurement or Agreement only to do a Wrong to cause a Remitter, shall make her Disseisorefs so far as to make her lose her End in agreeing to the Wrong, and she shall not gain a Remitter by it.

Covin is a secret Assent in the Hearts of two or more to the Defrauding and Prejudice of another, which often choaks a man's Right, and the ill Manner makes a good Matter unlawful. As if one who has a just Cause of Action be of Covin to raise up a Ten't by Wrong against whom he may recover, such a Recovery may be avoided, and tho' the Dis'sor's Endowment of one who has a good Title of Dower shall bind

the Dis'see, yet if she be of Covin to the Dis'sin, it shall not. If Ten't *T.* and his Issue disseise the Discontinuee to the Use of Ten't *T.* and Ten't *T.* die, the Issue shall not be remitted as against the Discontinuee, tho' against all others he shall, and shall deraign the first Warranty. *A.* and *B.* are jointly intituled to a real Action against the Disseisor's Heir, *A.* causes him to be disseis'd by one against whom they both recover, *B.* only shall be remitted.

If the Estate be made by the Discontinuee to the Husband and Wife on Condition, the Remitter as it defeats the Estate defeats the Condition, &c. annex'd to it, yet the Husband is estopp'd to plead it.

If the Husband had discontinued the Wife's Land, and taken back a State to himself for *L.* Rem'r to his Wife for *L.* this had been no Remitter to her during the Husband's Life, because while he lived she had no Freehold. But upon his Death the Freehold in Law cast on her against her Will had been a Remitter, (and yet no Affise lies for one that is ousted of a Freehold in Law,) for there is none against whom she could bring her Action, and she was Ten't to the *Præcipe*; nor did her Power to waive such Estate prevent the Remitter, tho' she was sole and of Age at the Time when the Freehold was cast on her. So if Ten't *T.* have Issue two Sons of Age, and he make Lease to the Elder for *L.* Rem'r to the Younger for *L.* or *T.* and die, the Elder is not remitted because he agrees to the Lease, but there shall be a Remitter to the Young-

358.

359.

Vid. supra,
443.

er, if the Elder die without Issue. So if the Heir of Dis'sor make a Lease *L.* Rem'r to Dis'see for *L.* &c. So if Ten't *T.* infeoff his Heir apparent and others by Deed, and make Livery to the others in the Heir's Absence, who never agrees, and the other die, and the Heir in his Father's Life never occupy nor take the Profits, and after the Father die, he is remitted. But it seems, that if the Son had seal'd a Counterpart either in this Case or in the former, where a Rem'r was limited to the younger Son, or if Ten't *L.* had been impleaded, and made Default, and he in Rem'r had been receiv'd, he should not be remitted, because he agreed in the Father's Life. And tho' the Statute of *Glocester* give Damages against him that shall be found Ten't of the Land, yet if a Deed of Feoffment be made to *A.* *B.* and *C.* and Livery be given in *C.*'s Absence, and *C.* never agree, nor take any of the Profits, and they die, and he survives, and a Writ of Entry *sur* Dis's'in be brought against him, he may plead the whole Matter, and discharge himself of the Damages for a Statute shall never be so construed, that he who is purely innocent shall be damaged thereby.

360.

And if an Abbot or Bishop had discontinued, and Discontinuee had charg'd the Land, and afterward by Licence had infeoff'd the Abbot or Bishop, the Successor should have been remitted, and should have holden the Land discharged.

¶ If one recover against Ten't *T.* in a false or feign'd Action by Default, *Nil* Dicere Confessio

Confession or Demurrer, and sue Execution, and after Ten't *T.* disseise the Recoverer, and die seis'd, his Issue shall be remitted. For if the Recoverer had continued seis'd, the Issue in a *Formedon* might have falsify'd the Recovery, and prov'd the Action feign'd in Law, and therefore he shall be remitted, because there is none against whom he can bring his Action; and if Ten't *T.* against whom such Recovery was had, had died before Execution sued, and a *Scire Facias* had been brought against the Heir, he might in pleading have shew'd how the Action was feign'd or false, and barr'd the Demandant.

361.

An Action is false when the Words of the Writ are false, as when they suppose a Dis'in where there was none: an An Action is said to be feign'd, when tho' the Words of the Writ are true, yet by Reason of a Release or some such Matter, the Demandant has no Right to recover.

If Land be recovered against Ten't *T.* the Issue cannot falsify in the Point tried by the Jury, tho' all the Jurors be dead, so that he can't have an Attaint; but he may falsify the Recovery by Pleading some Matter which Ten't *T.* did omit, or he may confess and avoid the Point tried.

If in a common Recovery Judgment be had against Ten't *T.* where he vouches, and has Judgment to recover over in Value, tho' he die before Execution, yet may it be sued against the Issue in Tail, for the Right of the Entail is bound by the Judg-

ment to recover over in Value in Respect of the intended Recompence.

362.

A Recovery had against Ten't *L.* whether with or without Title, and Execution had, discontinues the Rev'n or Rem'r but if he be of Covin, and consent to the Recovery, or suffer a Common Recovery, he forfeits his Estate. And by 14 *El.* 8. full Remedy is provided for the Entry of him in Rev'n or Rem'r, tho' *the Action were not brought against Ten't L. himself, but against his Grantee, and he came in as Vouchee*, but if the Assent of him in Rev'n or Rem'r appear of Record, the Ten't *L.* is guilty of no Forfeiture, but such Assent must appear on the same Record on Voucher, Aid-preyer, or Receipt of him in Rev'n or Rem'r, and not by any extrajudicial Entry, or Memorandum, nor does the said Act extend to the Case where Ten't *L.* is impleaded, and vouches him that has the immediate Rem'r in *T.* who vouches over the Common Vouchee.

If Ten't *T.* discontinue and die, and the Issue bring a *Formedon* against the Discontinuee, who pleads Non-Tenure, and utterly disclaims in the Tenancy, Judgment shall be that the Ten't go without Day, and the Demandant may enter notwithstanding the Discontinuance. So if a Dis'see bring a Writ of Entry *sur Dis'sin* against the Disfeisor's Heir who disclaims, the Dis'see may enter, and shall be remitted, or rather shall recontinue the former Estate, for in these Cases the Demandant has no Right to two Estates; *what is here said of Non-Tenure*
I pleaded

pleaded, must not be understood of a Simple Plea of Non-Tenure, but of Non-tenure pleaded with a Disclaimer, for the Plea of Non-Tenure signifies no more than that the Ten't has not the Freehold, which may be true, yet he may have a Rev'n in Fee expectant on a State L. so that in that Case, the Demandant re-entring should not be remitted to the whole Fee.

In Formedon if the Ten't disclaim, the Demandant can't aver his Writ, but may pray his Judgment and enter, but where Damages are to be recovered, the Demandant may aver that he is Ten't, as the Writ supposes, for the Recovery of the Damages, or may relinquish the Averment, and enter into the Land because of the Disclaimer. 3 Lev. 350.

N. B. In the Case above, Judgment is *quod Tenens eat sine die*, and the like Judgment is given when Excommunication is pleaded in Disability of the Plaintiff, or when Judgment is given for the Ten't on any Plea in Bar, or to the Writ; and the Entry of the Judgment against the Plaintiff always is *quod Nihil Capiat per Breve*; whether the Plea went in Bar or to the Writ, and it appears by the Record on what Plea the Judgment was given. 363.

A general Averment is that which is used in the Conclusion of affirmative Pleas, which is in this Form, *hoc paratus est Verificare*, a particular Averment is when the Life of Ten't L. or T. is avouched, which is call'd an Averment, tho' the words *Verificare*, &c. be not used.

Where the Entry of a Man is lawful either in Respect of a Dis's'in, &c. or of a Forfeiture, and he takes an Estate in Fee, Tail, or for *L.* or *T.* yet he is remitted, tho' he be of full Age, and openly say in the Country that he claims nothing in the Land but by Force of such Conveyance; but if he disclaim in a Court of Record that he has no Estate but by Force of such Lease, &c. he is concluded; so if he take an Estate by Indenture, for that is the Deed of both Parties, and a Rent or Condition therein reserved is good.

If a Dis's'or suffer a Stranger to usurp to an Advowson appendant, or the Discontinuance of a Mannor grant away the Advowson in Fee, yet the Dis's'ee or Issue by re-continuing the Manor, re-continue the Advowson. A Patron is outlaw'd, the Church becomes void, six Months pass *K.* recovers in *Quare Impedit*, this recontinues the Advowson to the Patron.

364.

If two Jointenants, one of Age, the other within Age be disseis'd, and the Dis's'or die seis'd during the Nonage of one of 'em, and the Heir let the Land to them both being then of full Age for *L.* this is a Remitter to him whose Entry was lawful, not to the other.

Where Parceners or Jointenants have the same Remedy, and one enters, the other shall enter also, so where the Entry is not lawful, and they join in a real Action, and one is summoned and severed, and the other recovers, both shall enter; but when their Remedies are several, as when two Parceners are disseis'd and the Dis's'or dies seis'd, and

and then the Parceners die, and the Issue of one of 'em recovers, the Issue of the other shall not enter with her.

A. and B. Jointenants in Fee are disseis'd by the Father of A. who dies seis'd, A. being his Heir enters, he is remitted to the Whole, and his Companion shall take Advantage of it, tho' in the Case above, the Jointenants who was disseis'd in his Nonage shall only be remitted, for the Advantage which the Law gives him, is founded rather on his Infancy, which is Personal and peculiar to him, than on his Right, but in this last Case the Right of Entry which B. had in Jointure with A. shall not be lost by a Descent to A. in Respect of the Privity between 'em.

But if the Grandfather had been the Disseisor, and the Land had descended from him to the Father, and from the Father to A. B. who shall enter with him, for the Entry was taken away by the first Descent.

And in the Case above, if the Infant Jointenant had surviv'd his Companion after the Descent to the Heir of the Dis'sor, some say he should have entered into the Whole, because he is now in Judgment of Law solely in by the first Feoffment, and claims nothing from his Companion, whose Right of Entry was bound by the Descent. Co. L. 185. a.

Of Warranty.

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Warranty is a Covenant real, annex'd to Lands or Tenements, whereby one is bound to warrant the same, and either on

X 5

Voucher

365.

Voucher, or by Judgment in *Warrantia Chartæ*, to yeild others to the Value of those evicted by a former Title. And if one bring an Action to recover Land which he is bound to warrant, the Ten't may plead the Warranty in Bar, which is called a Rebutter, and at Law all Warranties not commencing by Dis's'in, which descended to the Heirs of him that made 'em, barr'd the Heirs to demand Land against 'em.

There are likewise Contracts, &c. annex'd to Chattels, not here treated of; but what is here spoken, is to be understood of Warranty of Freehold, &c.

By the Statute of *Glocester*, Ch. 3. these Things are provided. 1. If Ten't by Curtesy, or Husband seis'd in Right of his Wife, alien with Warranty, and die, this shall be no Bar to the Heir in a *Mortancestor* without Assets in Fee; but if Assets descend to him from the Father, he shall be barr'd, having Regard to the Value thereof. Tho' the Writ of *Mortancestor* only be mentioned in this Part of the Act, and after Writs of Aiel, &c. only, yet other the like Writs are within the Purview of the Statute, for the said Actions are put but for Examples.

Tho' the Words be if Ten't by Curtesy alien, yet if he release with Warranty to a Dis's'or, it is within the Purview of the Statute: So if a Tenancy escheat to Ten't by Curtesy of a Seignior, and he alien with Warranty, and die, this shall not bind the Issue, for these Cases are equally mischievous.

But

But Ten't in Dower by Alienation with Warranty, might bar the Heir till 11 H. 7. 20. But an Estoppel on the Mother's Part barr'd not a Claim as Heir to the Father; as if Lands were given to *B.* and his Wife, and *B.*'s Heirs, and *B.* had discontinued in *T.* to *C.* and after his Death the Wife had recovered in a *cui in vita*, supposing that she had the Fee, and made a Feoffment, and died, and *C.* had died without Issue; the Issue of *B.* was not estopp'd to bring his *Formedon* in Reverter, for Warranties are favoured, but Estoppels are odious.

The Heir of a Disseisor being a Feme, makes a Feoffment with Warranty, and marries the Dis'see; the Wife's Warranty shall rebut the Husband tho' he claim not in her Right; *for it shall be presum'd that he has Land in her Right to the Value of that which he demands, which might be recovered from him and his Wife by Force of the Warranty, therefore he shall be rebutted to avoid Circuity of Action.* If Husband and Wife demand the Right of the Wife a Collateral Warranty of her Ancestor is a good Bar.

B. seis'd in Fee levied a Fine to the Use of himself for *L.* and after to the Use of Wife in special Tail for her Jointure: They levy a Fine, and suffer a Common Recovery, and die; this has been holden to be within the Meaning, tho' out of the Letter of 11 H. 7. & *e converso*, a Case may be without the Meaning, and yet within the Letter; as if they both levy a Fine, of the Land of the Wife, and Conusee render to 'em

em in special *T.* Husband diés, and Wife with a 2d Husband levies a Fine, this is out of the Meaning of the Statute, because the Land came originally from the Wife.

But before 4 & 5 *Anne* 16. Collateral Warranty of every other Ten't *L.* barr'd the Heir in Rev'n or Rem'r, not entring in the Ancestor's Life; but if he had enter'd for the Forfeiture, and avoided the Estate to which the Warranty was annex'd, the Warranty was avoided also; *but by that Act all Warranties made by Ten't L. descending to him in Rev'n or Rem'r, are void.*

2. by Statute of *Gloucester*, if Affets after descend, the Ten't shall by Writ, (which must be *Scire Facias*,) out of the Rolls of the Justices, recover the Inheritance of the Mother: But in *Formedon*, if the Demandant recover, for want of Affets at the Time of the Warranty pleaded, and after Affets descend, the Ten't shall recover the Affets and not the Land entail'd; for if he should recover the latter, and after the Affets should be aliened, his Issue might recover the Land entail'd again; therefore to prevent future Occasions of Suits, the Judges resolv'd the said Diversity in the said Cases.

If the Ten't will be aided by the Statute, he must plead the Warranty, and confess the Demandant's Title, and pray that the Benefit of the Statute may be sav'd to him; but if he plead the Affets descended, and Issue be taken thereon, and found against him, he loses all Advantage of the Statute by his false Plea.

Warranty

Warranty may be annex'd to Incorporeal Inheritances; and to a Rent newly created, and if the Land be evicted by an elder Title, the Grantee may be help'd by *Warrantia cartæ*; and a Warranty in Law is imply'd in a Grant of a new Rent in Exchange or for Owelty of Partition.

B. seis'd of a Rent-Seck in Fee, takes a Wife, and releases to the Ten't, and Warrants *tenementa prædicta*, and dies, the Wife brings Dower for the Rent; the Ten't shall vouch the Heir of the Husband, for tho' the Release enur'd by Way of Extinguishment, yet the Warranty extended to it, and by Warranting of the Land, *the Warrantor is bound to secure it to the Warrantee in the same Freedom in which it was at the Time of the Warranty made*; and therefore all Rents' &c. issuing out of it, that were suspended or discharged, are warranted also.

Warranty commencing by Dis's'in is so call'd, because regularly the Conveyance to which it is annex'd, works a Dis's'in, as when Lessee *T.* or Ten't by Execution, or Guardian, make a Feoffment with Warranty, &c.

So where a Dis's'in, Abatement, or Intrusion, or Entry into Land escheated to the Lord before the Lord's Entry, &c. is made, with an Intent to make a Feoffment with Warranty.

Such Warranties shall never bar the Heir whether the Wrong were done immediately to the Heir or not; therefore if the Father be Ten't *L.* with Rem'r in Fee to the Son, and the Father by Covin make a Lease *T.* to the Intent that the Lessee may make a Feoffment

367.

offment to one to whom the Father shall make a Release with Warranty, and this be executed accordingly, it shall not bind the Son, for the Father was *particeps criminis*. *B.* gives Land into *T.* to a Brother, the Uncle disseises the Donee, makes a Feoffment with Warrantry, and the Donee dies without Issue, *B.* is not barr'd. Father and Son and *B.* are Jointenants in Fee, the Father makes a Feoffment of the whole with Warranty, and dies, the Son dies, *B.* shall avoid the Feoffment for the Son's Part as well as his own.

Tho' a Feoffment by Lessee *T.* work a Disseisin to the Lessor, yet it is a good Feoffment between the Parties, and against all Strangers except him that has Right; and the Feoffor and his Heirs may be vouch'd by Force of it, and such Feoffment by the Lord being Lessee *T.* of the Tenancy, shall extinguish the Seignior.

Father and Son are Jointen'ts in Fee, the Father aliens the whole with Warranty, and dies, the Son shall avoid it for a Moiety: But if they had been Jointen'ts *L.* Rem'r to the Son in Fee, and the Son had enter'd in the Father's *L. for the Forfeiture*, he had avoided it wholly: But if he had not enter'd in the Father's Life, he should have avoided it for a Moiety only before 4 & *Annæ* 16. because the Warrantry commenced not by Dis's'in, but for a Moiety. If they had been Jointen'ts *L.* Rem'r to the Father in Fee, the Son's Entry, *tho' it shall re-continue his own Estate L. in the Moiety where*

of he was disseis'd, shall not avoid the Warranty of the Fee of the said Moiety, because it was in the Father's Power lawfully to convey the same.

An Infant, and B. being of Age, join in a Feoffment with Warranty of Lands whereof they are jointly seised, the Warranty is good as to B. for the whole, for one may warrant more than passes from him, and void as to the Infant; for tho' his Feoffment be but voidable, his Warrantry taking Effect by Deed only, is void.

B. is seisd of an House, and C. having no Title enters, claiming it to him and his Heirs; B. still abiding in it, the Law adjudges B. in Possession, for *duo non possunt in solido unam rem possidere*: And when two are in Tenements claiming by several Titles, he is in Possession that has Right to have the Possession: But if C. make a Feoffment with Warranty to certain Barretors, to have Maintenance from 'em, by reason of which B. leaves the House, (which must be before the Livery of Seisin, or otherwise the Livery is void,) this is a Warranty commencing by Disseisin.

A Barretor is a Mover of Suits and Quarrels, in Courts of Record, or Courts Baron; or in the Country, Three Ways; 1. By Disturbance of the Peace. 2. Taking or keeping Possession of Lands in Controversy, by Force or Subtilty. 3. Spreading false Rumours and Reports to raise Discord among Neighbours.

Extortion, in a large Sense, is any Oppression under Colour of Right. Properly
it

it signifies any Officer's unlawful taking by Colour of his Office, any Fee not due, or more than is due, or before it is due. By *W. 1.* no Minister of *K.* should take any Reward for doing of his Office but only that which the *K.* allows him, on Pain to render double to the Party, and to be punish'd at *K.*'s Pleasure, and this was an Offence fineable at Law. But latter Statutes have allow'd 'em Fees in many Cases. It is no Extortion for inferior Officers of Courts to have such reasonable Fees as have been allow'd by the Courts for their Attendance.

Maintenance is an Upholding of Quarrels and Sides, to the Hindrance of Common Right, and is Twofold: 1. In the Country, as by taking and holding Possessions, &c. which is punishable only at *K.*'s Suit. 2. In Court, and this either, 1st. By maintaining to have Part of the Thing in Plea, which is call'd *Champerty*; and against such Offender a Writ of *Champerty* lies grounded on *Articuli super Chartas*, and the Offender shall forfeit to *K.* the Value of what was purchas'd by him, and it seems that the Seller shall forfeit the same. Or, 2dly, By maintaining one Side without having any Part of the Thing in Suit, and for this an Action of Maintenance lies at Common Law. Or, 3dly, By labouring a Jury, tho' it be but to appear, or instructing them, or putting 'em in Fear; and this is call'd *Embaccery*, and an Action of Maintenance lies against the Offender. If one give Money to any of the Jurors, a *decies tantum* lies against him, and such Jurors, at the Suit of *K.* or

F. N. B.
372.

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2 Inst. 208.

5 E. 3. 10.
34 E. 3. 8.
38 E. 3. 12.

K. or of the Party, or any Stranger. Nor is it material whether the Jury pass on his Side, or give any Verdict at all.

By 32 H. 8. 9. he that buys, sells, takes, or makes Promise, Grant, or Covenant, to have any Right or Title to any Land, Tenement, or Hereditament, whereof the Seller, or they from whom he claims, have not been in Possession a Year before, shall forfeit the whole Value of the Lands.

Any naked Right stripp'd of Possession is within the Statute, whether it be really a good Right, as that of a Dis'see, or pretended only by a Stranger. So if it be a good Right coupled with a wrongful Possession, as if a Dis'see disseise Dis'sors Heir, and make a Feoffment before he has been a Year in Possession.

A customary Right to a Copyhold is within the Statute, and so is a Lease T. for the Words are any Right; but a Lease T. made to try the Title in Ejectment, is not within the Statute, unless it be made to a great Man, or any other to sway the Cause.

But whoever has the absolute Ownership, so as no other has *jus Proprietatis*, or *Possessionis*, may sell, tho' he has not been a Year in Possession. As if one be remitted, or recover on a former Title, or redeem a Mortgage, or being a Dis'sor gain the Release of the Dis'see.

There is a *Proviso*, which the Law wou'd have imply'd, That he who is in lawful Possession may take a Release of a pretended Right by any reasonable Means; and tho' a Man's Possession be wrongful as by Disseisin,

fin, &c. yet a Release to him is lawful. A Rem'r Man may lawfully get a Release or Confirmation of any Stranger, having a pretended Right: But it is unlawful to take a Covenant, that when he has recovered he shall convey to him, for this is not a reasonable Means.

If a Man enter into Land to which he has no Title, and presently make a Feoffment with Warranty, or if he disseise one with Intent to make a Feoffment with Warranty, and afterward make such Feoffment, these Warranties commence by Dis'in; for in the 1st Case, *quæ in continenti sunt inesse videntur*; in the 2d, the Law couples the Intent, and Feoffment made in Pursuance thereof together.

370.

One suing a *Juris utrum*, or other Writ in the Right of the Church, shall not be barr'd by a Warranty of his Ancestor. And it seems also, that he shall not be barr'd in Affize, tho' it be brought of his own Seisin, and the mean Profits be to be recovered to his own Use, for the Freehold is the Right of the Church.

K. before *W. 2.* might be barr'd of a Possibility of Reverter descending to him *in jure Coronæ*, by Warranty and Assets from a Subject descending on his Body natural; for in all likelihood those Lands will descend to the same to whom the Crown will descend, and consequently will be a good Recompence for the Loss of the Crown Lands; but in the Case of the Parson, his Successor can have no Benefit of what the Predecessor has in his natural Capacity.

A War-

A Warranty is said to be lineal, whether it descend on an Heir lineal or collateral, if the person on whom it descends might possibly have claimed the Land as Heir to him that made the Warranty. As when the Father seises'd in Fee makes a Feoffment with Warranty, and dies, and the Warranty descends to the Son: Or when the Father releases with Warranty to the Grandfather's Dis'sor, and dies, and the Warranty descends to the Son, for he can't convey to himself the Descent of the Land but by the Father. So if the elder Son release to the Father's Dis'sor with Warranty, and die without Issue, and then the Father die, the Warranty is lineal, because the younger might have convey'd the Title to the Land from the elder. And note, that in these two last Cases the Warranty descends before the Right. Co. L. 388.

But if the Father disseise the Son, and make a Feoffment with Warranty, this is collateral, for the Title which the Son has can't possibly descend from the Father; so if the youngest Son release to the Father's Dis'sor with Warranty, and it descend on the eldest, for they that make these Warranties are collateral to the Title of the Land.

A Warranty may be annex'd to any Conveyance whereby an Estate passes, or to a release or Confirmation made to the Tenant of the Land by one who never had any Estate therein, but a Voucher by Force of which Warranty may be counterpleaded; and *quare*, whether an Assignee can take Benefit thereof.

371.

If

372.

If Ten't *T.* have Issue three Sons, and discontinue, and the middle Brother release with Warranty, and die without Issue, this is collateral to the eldest, and should have barr'd him, (*before 4 & 5 Annæ 16. but by that Statute all collateral Warranties of Lands, &c. by any Ancestor who has no Inheritance in the same, are void against the Heir;*) but it is lineal to the youngest, and shall not bar him by Force of *W. 2. 1.* for he might possibly have convey'd to himself a Descent by Force of the Tail from the middle Brother, but the eldest could not. Hence note, That a Warranty which is lineal as to one, may be collateral to another.

A collateral Warranty did never give a Right, but only bound it, and therefore if it be determined or defeated, the Right revives. The Plaintiff may make himself a Title in an Assise by it, where the Right of the Ten't is bound by it.

By 32 *H. 8. 36.* a Fine with Proclamations, levy'd by Ten't *T.* bars the Estate *T.* but not the Rev'n or Rem'r, if Claim be made within five Years after the State *T.* spent. A Gift in *T.* is made to the eldest Son, Rem'r to the Father in *T.* the Father dies, the Son levies a Fine with Proclamations, the first Estate *T.* and Rem'r also are barr'd, for the Rem'r descended to the Son.

A Fine with Proclamations by the Ten't of the Land, bars the Right of an Entail if he that has Right to the Entail claims not within five Years.

If Ten't *T.* in Possession, or he that has Right of Entry be attainted of High-Treason, the Land is forfeited to *K.* and the Entail barr'd. 26 H. 8. 13.
33 H. 8. 20.

A Common Recovery bars all Entails, but since 34. *H. 8. 20.* it is not in the Power of Ten't *T.* of the Gift of the Crown, by any Act or Thing had, done, or suffered by him, to bar an Estate *T.* whereof the Rev'n or Rem'r shall be in the Crown.

But if *K.* have granted away the Rev'n in Fee, or if the Estate *T.* were made originally by a Subject, or by *K.* before he was *K.* it may be barr'd.

A Common Recovery never could bar a Rev'n in *K.* and since the Statute if *K.* make a Gift in *T.* Rem'r in *T.* as the Estate in Possession cannot be barr'd, so neither can the Rem'r.

Those Words in the Statute where the Rem'r shall be in *K.* are not void; for if the *K.* for good Consideration procure a Gift in *T.* to be made to a Subject, Rem'r to himself, this Rem'r is within the Act, if it be in Fee or *T.* not for *L.* or *T.* only.

Tho' such Ten't *T.* can't bar the Entail by any Act done or suffer'd by him, yet it may be barr'd by Acts to which he is not privy; as if a Disseisor levy a Fine with Proclamations, and five Years pass, or if a collateral Ancestor had released with Warranty

before 4 & 5 Ann. 16.

The Act extends to Gifts in *T.* made since the Statute, for they are in equal Mischief, tho' it only mention Gifts in *T.* made before.

A Re-

A Recovery in a *Cessavit*, or Writ of Right without Voucher, are not Bars of an Estate Tail.

If Ten't *T.* be disseised, have Issue and die, and his Uncle release with Warranty and die without Issue, the Warranty is collateral to the Issue in *T.* because he can convey himself to the Entail by means of his Uncle; and such Warranty did bar the Issue to demand the Land before 4 & *Annæ* 16.

The Reason why a Warranty was a Bar at Common Law, was for that *Nemo presumitur alienam posteritatem suæ prætulisse*. And no Proof is admitted against this Presumption; (and tho' lineal Warranty after *W. 2.* was holden to be no Bar without Assents, yet it was holden that collateral Warranty remained after the said Statute as it was at Common Law:) So if the Lord make an Acquittance for the last Rent, all the rest is presumed to be paid, and the Law will admit no Proof against the Presumption; for it can't be imagined that the Lessor, who is not bound to give any Acquittance, should voluntarily by his solemn Deed acquit the Ten't of Rent due on a latter Day, if he were in Arrears before: But where a Ten't is in Arrears, and Lessor distrains, and avows for Rent due the last Day of Payment, this shall not estop him to demand Rent due a former Day; for perhaps he might not punctually be certain how much was due, and therefore willing to demand no more at first than he was secure of recovering, and bring a new Action afterwards for the rest. If a

1 Sid. 44.

1 Lev. 43.

Vid. 1 Saun.

285, 286.

2 Lut. 1173.

Writ of Man be within the Four Seas, and his Wife
 rs of have a Child, the Law presumes it to be his.
 f a Man be found to have fled for Fear of
 Issue and Felony, he forfeits all his Debts and Chat-
 Warranty tels, tho' he be after judicially acquitted of
 ty is coll the Felony, and no Proof can be against the
 he can presumption grounded on his Flight; *nor*
 means does he deserve any Favour from the Law
 bar the who will not suffer himself to be tried by it;
 4 & out the general Rule is, *Stabitur præsump-*
tioni donec probetur in contrarium.

s a Bar Ten't T. has Issue two Daughters, and
 o præsu dies, the eldest enters into the whole, and
 etulisse hereof makes a Feoffment with Warranty,
 his Pre and dies without Issue; this is collateral to
 ty after the youngest as to the one Moiety which
 out Af belong'd to her, and lineal as to the Moiety
 el War belonging to the eldest.

te as is A Parcener by entring into the Whole, Vid. supra,
 e Lord devests not the Moiety of the other; but if 331.
 ent, all he claim the Whole, and take the whole
 ne Law profits, this does devest the other's Moiety;
 sumpti- out she cannot after an actual Entry by her
 Lessor, Companion, devest her Moiety without an
 ittance, actual Ouster: And it may be ask'd, How
 acqui the Warranty in the Case above could bind,
 y, if be eing it was annex'd to a Feoffment, which
 Ten's id work a Wrong? The Answer is, When
 s, and ne Sister enters into the Whole, and makes
 yment, Feoffment of the Whole, the subsequent
 nt due st so far explains the first Entry, that now
 ht not y Construction of Law she was at first seis'd
 ue, and all.

at first Ten't in Special T. has Issue a Daughter,
 bring his Wife dies, he marries again, and has Issue
 If a another
 Man

another Daughter, and discontinues; a collateral Ancestor releases with Warranty, which descends on both Daughters, the elder was wholly barr'd for the Warranty entire.

By Force of *W. 2.* lineal Warranty without Affets, is no Bar of an Estate *T.* but it is still a Bar to an Estate in Fee, and collateral Warranty was a Bar both of a State in Fee, and *T.* with or without Affets, before 4 & 5 *Annæ 16.*

Affets requisite to make a lineal Warranty a Bar, must be of equal Value with the Land which it bars one to demand, and descend from the same Ancestor that made the Warranty, and it must be a real Inheritance in State or Interest; not a bare Use, or a Right of Entry or Action, which are not Affets till they are reduc'd to Possession: But a Rent issuing out of the Heir's Land descending to him, whereby it is extinct, is Affets. An Advowson is Affets, and may be extended at the Rate of a Shilling for every Mark of the Yearly Value of the Living. A Seigniorie in *Frankalmoine* is not Affets, because it is not valuable.

375.

Land is giv'n to Husband and Wife in Special *T.* he makes a Feoffment, and dies, she Releases with Warranty, and dies this is lineal as to the whole; and the Law is the same if the Gift had been before Marriage, in which Case they had taken by Moieties, for the Heir must claim as Heir of both their Bodies.

A. B. and *C.* are Brothers, a Gift is made to *A.* in *L.* Rem'r to *B.* in *T.* Rem'r to *C.* in

T. A. discontinues with Warranty: This is collateral to the Brothers, because the Rem's are their Titles, and to those *A.* is collateral; and it seems that such a Warranty does still bar the Rem's. because it is not with- in 4 & 5 Annæ 16. which speaks only of Warranties made by them who have no Estate of Inheritance in the Land, &c. Sed Q. If a Warranty made by the Donor shall be a Bar, inasmuch as tho' it be collateral, and made by an Ancestor who has an Inheritance in the Land, yet the Estate of the Donees doth not depend on the Donor's, but his on theirs.

Warranty always descends to the Heir at Law of him that made it, therefore if an elder Brother be Ten't in Tail-Mail Rem'r to the younger, and make a Feoffment with Warranty, and die, leaving a Daughter, the younger is not barr'd, because the Warranty does not descend on him.

376.

If the Warranty descend on one, and the Land on another, as special Heir, viz. by Custom of *Burgh Eng.* or *Gavelkind*, or Heir on the Part of the Mother; the Heir at Law may either be vouch'd alone, or the other may be vouch'd with him as Heir to the Land; and it seems that if their be a Warranty Paramount, they shall join in vouching it, and the Recompence shall go to the special Heir alone, for he only had the Loss. So if a Recovery be had against Ten't *T.* and his Wife, and they vouch, and have Judgment to recover in Value, he dies, his Issue only shall sue Execution, tho' the Wife was privy to the Judgment.

Y

Bastard

Bastard *eigne* shall be vouch'd alone, for he is Heir in Appearance by taking the Profits, and shall not disable himself.

But a Personal Lien descends on all the Heirs, as if an Obligor die seised of Gavel-kind Land, Debt lies against all his Sons.

And Debt on the Ancestor's Bond may be maintained against the Heir of the Mother's Part only.

377.

If Land be given to *A.* and the Heirs Males of his Body, Rem'r to the Heirs Female of his Body, (in which Case all the Issue Male shall first take, and the Estate to the Females is in Rem'r;) Donec make a ~~Feoffment~~ with Warranty. This is lineal to his Daughters as well as Sons; for wherever the Ancestor takes a State *L.* and after in the same Conveyance there is a Limitation to any of his Heirs, the Inheritance vests in the Ancestor. But in this Case Warranty made by a Brother, is collateral to the Sisters.

If Land be given to the eldest Son in Tail on Condition, that if he or his Issue shall alien in Fee or *T. &c.* that then their Estate shall cease, and be void, and that the Land shall immediately remain to the 2d Son in Tail & *sic ultra*, the Rem'r to the other Sons and Livery be made accordingly, these Rem'rs are void.

378.

1. Because every Rem'r commencing by Deed ought to vest in him to whom it is limited, when Livery is made to him that hath the particular Estate. But when Land is rendered by Fine for *L.* Rem'r in Fee or *T.* the Rem'rs are not in 'em in Rem'r, before the

the particular Estate is executed. And when a Rem'r on a Lease *L.* is limited to the Heirs of *J. S.* then living, it is not possible that it should vest while *J. S.* lives; but it is sufficient that the Inheritance passes presently out of the Lessor. So if a Lease *L.* be made to *A. B.* and *C.* and if *B.* survive *C.* then the Rem'r to *B.* in Fee; this is a good Rem'r for it depends on a Limitation of Time, *viz.* the Possibility of the Death of one Man before another, which is a common Possibility.

One makes a Lease *L.* with Condition to have Fee, and Warrants the Land in *formâ prædictâ*, &c. The Condition is perform'd in the Lessor's Life, or after his Death, the Warranty encreases with the Estate, for there was a present Estate on which it might enure; and the whole vests in the Lessee in such manner as if it had pass'd by the Livery. But if a Scignior be granted for *T.* on Condition to have Fee, with Warranty in *formâ prædictâ*, the Warranty shall not extend to the Fee, because the first Estate was not capable of a Warranty: So if one make a Lease *T.* Rem'r in Fee with Warranty in *formâ prædictâ*, Rem'r Man can take no Benefit of the Warranty, because he is not Party to the Deed; and if he were, he could not take immediately, because named after the *Habendum*; and he can't take Benefit of it by way of Rem'r, because the Lease *T.* is not capable of a Warranty. If Land be giv'n to *A.* and *B.* Rem'r to the Heirs of him that shall die first, with Warranty in *formâ prædictâ*; *A.* dies, his Heir shall have the

Warranty, and shall have the Land as Heir, tho' the Fee vested not in A. and he had but a Possibility.

Co. L. 26. a.
46. b.

379.

(a) Cro. Ja.
593.

2. The Rem'r in the Case aforesaid is void, because the same Alienation that transfers the Fee and Freehold to the Alienee, and divests the Donor's Rev'n, can't vest a Rem'r in the 2d Son: As if a Lease L. be made with Condition, that if Lessor grant over the Rev'n the Lessee shall have Fee, and the Lessor grant the Rev'n by Fine, the Lessee can't have Fee, for the same Alienation can't vest an Estate of the same Land in several Persons at once. *J. S.* grants the next Presentation of a Church, and before it becomes void, grants the next Presentation of the same Church to another, the 2d Grant is void: But if the Patron take a Wife, and grant the 3d Presentation and die, and the Heir present twice, and the Wife the 3d Time, the Grantee shall have the 4th presentation, for the 3d was given to the Wife by Act of Law, and the 3d Presentation in the Grant, shall be taken for the 3d which he lawfully might grant. *Sed Q. (a) How one can take any other Turn by a Grant of the 2d or 3d Turn, which can by no means be brought within those Words.*

3. In the said Case those Words on Condition, &c. that the Estate shall cease, give a Re-entry to the Donor only, and the Words Subsequent are void. Father makes Gift in T. to his eldest Son, Rem'r to the Youngest, with such Condition as is in the Case in Question, the Eldest makes a Feoffment with Warranty, Father dies, and the

the Eldest dies without Issue, the Youngest shall enter, for the Condition, by Force whereof the Father might have enter'd, descending to the Eldest was but suspended; nor can the eldest Son's Feoffment with Warranty in the Father's Life bar the youngest Son of his Entry by Force of the Condition, which depending on the original Deed binds the State of the Land into whose Hands so ever it comes, and can't be divested or barred by a Warranty; yet if the eldest Son disfeise the Father and make a Feoffment with Warranty and die, he bars the Youngest, because the Father's Estate in the Land being divested and turn'd to a Right, was consequently capable of being barr'd by a Warranty: And where the eldest Son is bound not to discontinue on such Condition as is aforesaid, if he make a Discontinuance after his Father's Death, the Condition is extinguish'd, for it was in him as Heir to his Father at the Time of the Feoffment, and was as much releas'd by it as if he had expressly releas'd it by Deed.

330a

At Law, if Ten't in Dower had alien'd with Warranty during the Nonage of the Heir, and died, this had not barr'd his Entry, but if he had come to full Age before her Death he had been barr'd, for it was his Folly not to enter and defeat the Warranty; and tho' in the first Case his Entry were not barr'd, yet if he had brought an Action he should have been barr'd in it; and if his Entry were taken away when the Warranty descended, his Right was bound by it. And the Law was the same as to a Feme

Covert. But Laches shall not be imputed to an Infant to take away his Entry in respect of a former Right by a Descent, or to bar his Right where his Entry is congeable. But he shall be subject to all Conditions, Charges and Penalties growing out of the Original Conveyance, and a *Cessavit* lies against him for Land of his own Purchase, and likewise for Land by Descent, but in the latter Case he shall have his Age. Matters of Record, as a Fine levied by an Infant or a Recovery suffer'd by him, or a Statute acknowledg'd by him during his Nonage *appearing in proper Person*, shall never be revers'd after his full Age, but only by Writ of Error, or *Audita Querela* brought during his Nonage, which *in that Case* can be tried by Inspection only, for the Law will not give Credit to any Averment so Derogatory from the Honour of those who are presumed to act with the greatest Integrity, and will admit of no Evidence less than that of Sense in a Matter of so high a Nature; but if an Infant appear by Attorney, and a Recovery be had against him, he may avoid it by Writ of Error for this Cause after his full Age, for

(a) whether he were within Age when he made the Warranty of Attorney shall be tried by the Country, and the reversing such Recovery no way reflects on the Honour of the Court; but if an Infant appear by his (b) Guardian, and the Court knowing him to be an Infant, after Examination had of the Circumstances, admit him to levy a Fine, &c. This shall never be revers'd either during his Nonage or after.

(a) Cro. E.
369.

(b) 1 Syd.
322.
Hob. 224.

If Land had been given to the Husband and Wife in Fee, before 32 H. 8. 28. and the Husband had made a Feoffment, and a collateral Ancestor of the Wife had releas'd and died, and then the Husband had died, this so bound the Wife's waiveable Right, that she could not waive it, and claim Dower.

In the End of the Statute of *Glocester* 3. it is thus provided, the Heir after the Death of the Father and Mother shall not be barr'd to demand the Heritage or Marriage of his Mother, which his Father alien'd in his Mother's Time, whereof no Fine is levied in the K.'s Court. And this Exception has been construed to extend only to a lawful Fine, *i. e.* one levied both by Husband and Wife, and not to one levied by Husband only, for these Reasons.

381.

1. It is most natural to expound one Part of a Statute by another, and by this Act the Alienation of Ten't by Curtesy by Fine with Warranty is restrain'd, therefore it shall be intended that the Alienation of the Husband alone seis'd in Right of his Wife was design'd to be restrain'd also.

382.

2. The general Words of a Statute shall be intended of a lawful Act, but a Fine by Husband alone works a Wrong to the Wife.

3. A Fine by the Husband alone is within the Mischief design'd to be remedied by the Statute, which was that the Heir should be barred of the Inheritance of his Mother by the Father's Warranty without Assets.

383.

An exprefs Warranty of a Freehold or Inheritance can be created only by the Word *Warrantizo* in *Latin*, or *Warrant* in *English*, for *Warrantizabimus* is the only Word in a Fine, which is ever used to this Purpose.

Tho' it be not exprefs'd to whom the Warranty shall extend, yet the Law by Implication gives the Benefit of it to the Feoffee.

384.

A Bond with Condition to defend such Land to *A.* for 8 Years is forfeited if a Stranger oust him without Action; but if it were on Condition to warrant the Land it shall not be forfeited unless the Obligee be impleaded, and then the Obligor must be ready to warrant, &c.

(a) 4 Rep.
80.

The Words, Grant, Demise, and the like in the Conveyance of a Chattel Real create a Warranty in Law, by force (a) whereof the Grantee, if evicted, shall in Action of Covenant recover Damages to the Value of what he has lost.

At Law if one had given Lands in Fee by the Word *Dedi*, to hold of himself and his Heirs, the Feoffor and his Heirs were bound to Warranty, but if he had given them to hold of the chief Lord, he was bound to Warranty during his own Life only, as a Feoffor by the Word *Dedi* is at this Day. If the Feoffee recover in Value by Force of such an implied Warranty, or of an exprefs Warranty made for the Life of the Feoffor only, he shall have a Fee in the Land recovered, because the Warranty while it continues, extends to the whole Estate of

the Land. If one make a Lease *L.* or Gift *T.* rendring Rent, not only the Donor and Lessor and their Heirs, but also their Assignees of the Rev'n are bound to warrant the Land to the Lessee and his Assigns: And if the Lessor also add an expresse Warranty, yet the Warranty in Law remains, and the Lessee has Election to use either; in like manner, if a Feoffor by the Word *Dedi* add a special Warranty against *J. S.* and his Heirs, yet *Dedi* gives a general Warranty against all Men, during the Life of the Feoffor. For the expresse Warranty shall not take away that implied by Law, where they may both well stand together, and it is manifest that the expresse Warranty is added to give the greater Security to the Feoffee or Lessee. (a) But where one makes a Lease *Y.* by the Words *Grant, Demise, &c.* and covenants that the Lessee shall enjoy the Land without any Eviction from the Lessor or any claiming under him, in this Case the Lessor shall not be bound to warrant the Land, by the imply'd Warranty, against an Eviction by a Stranger, for those Words can be of no Force, unless they be taken to explain how far the Lessor shall be bound to Warrant, and where it expressly appears how far the Parties design that the Warranty shall extend, the Law will not carry it farther by Construction of those Words which are generally used as Words of Course.

Endowment implies a Warranty, viz. that the Ten't being impleaded shall recover in Value on Voucher the 3d of the two Parts whereof she is Dowable. And Homage

Aunceftrel, Exchange, and Partition imply a Warranty, but the Assignee shall not vouch by Force of these Warranties, but in case of an Exchange, *Partition* and Feoffment by *Dedi*, he shall rebut, but the Assignee of Ten't by Homage Aunceftrel, shall neither vouch nor rebut the Lord, for the Advantage given to the Ten't in respect of the long Continuance of the Tenure can't be transferred to any Stranger.

Warranty in Law and Affets in some Cases, are a good Bar in *Formedon*; as the Ten't may plead that the Ancestor exchanged the Land demanded with the Ten't for other Land, which descended to the Demandant, whereunto he hath entred and agreed; or if he hath not entered and agreed, then he may plead the Warranty, and other Affets descended. But if Ten't *T.* make a Gift in *T.* or a Lease *L.* rendring Rent, and die, the Rev'n and Rent shall not bar the Issue in a *Formedon*, because the Design of the *Formedon* is to defeat the Rev'n and Rent, and *non potest adduci exceptio ejudem rei, cujus petitur Dissolutio*, but the Warranty in Law with other Affets is a good Bar.

Warranty in Law binds the Heirs of him that made it, but Warranty in Deed does not unless they be named.

An exprefs Warranty can't be created by Will, because a Man can't bind his Heirs to warrant, any more than he can bind his Heirs to pay Money, unless he be bound himself, but a Warranty in Law may be by Will, as when one devises Land for *L.* or in *T.* rendring Rent.

Co. L. 385.
a.

War-

Warranty in Law in some Cases extends only to Execution in Value of special Land, as in case of Exchange and Partition, and it may be created without Deed, but express Warranty cannot.

An express Warranty extends neither to the Heirs nor Assigns of the Feoffee, unless they be named; but if *B.* be infeoff'd with Warranty to him, his Heirs, and Assigns, and infeoff *C.* and his Heirs, and *C.* die, the Heir of *C.* shall vouch as Assignee to *B.* So if *B.* and *C.* be infeoff'd with Warranty to them, their Heirs, and Assigns, and they both die, and the Heir of the Survivor infeoff *D.* he shall vouch as Assignee to *B.* and *C.* for the whole Estate to which the Warranty was annex'd is lawfully conveyed to him, and Assignees of Heirs, and Assignees of Assignees, and Heirs of Assignees are comprehended under the Word Assignees.

The Father is infeoff'd with Warranty to him and his Heirs, and infeoffs his eldest Son with Warranty and dies, the Law gives the Son Advantage of the Warranty made to the Father, because that made to him by the Father is extinct by Act of Law.

But Covenants Real often go to an Assignee, tho' he be not named, as where a Parcener on Partition covenants to acquit the other of a Suit issuing out of the Land; Or when a Parson covenants with the Lord of the Manor of *A.* to celebrate divine Service in a Chapel, Parcel of the said Manor, weekly for the Use of the Lord and his Servants, for these Covenants are in a manner appurtenant to the Land. But if such
Covenant

Covenant had been with a Stranger, the Assignee should not have an Action of Covenant, for the Covenant can't be annex'd to the Mannor, because the Covenantee was not seisd of it.

The Assignee of Part of the Land shall vouch as Assignee, but an Assignee of Part of the State as Lessee or Donee shall not; but the Lessee may pray in Aid of the Lessor, and the Lessee or Donee may vouch the Lessor or Donor, &c. but if on such Lease or Gift the Rem'r in Fee be limited over, the Lessee or Donee may vouch as Assignee.

If one make a joint Feoffment with Warranty, and the Jointenents make a Partition by Consent, the Feoffor shall not be bound to

Vid. supra,
354.

warrant their divided Estate. Three are jointly infeoff'd with Warranty to them, and their Heirs, and one releases to the other two, they shall vouch; but if he had releas'd to one alone he had extinguished the Warranty for a 3d Part, for as to that, the Releasee is in by the Release, not by the Feoffment. If two be infeoff'd with Warranty to them, their Heirs, and Assigns, and one of them make a Feoffment, the (a) Feoffee shall not vouch, (b) 385. a. but the other shall (b) vouch for a Moiety; (c) Co. L. so (c) if one of the Feoffees had releas'd to the Feoffor, the other shall vouch for a Moiety, for he shall not lose his Warranty by the Act of his Companion; and if there be two Feoffors with Warranty, and the Feoffee release to one of 'em, yet he shall vouch the other for a Moiety.

Feoffee with Warranty to him, his Heirs and Assigns, makes a Gift T. Rem'r in Fee Donee,

Donee makes a Feoffment, his Feoffee shall not vouch as Assignee, because he comes not in Privy of Estate, *but by Discontinuance which is always by Wrong*; but he may vouch his Feoffor, and his Feoffor may vouch as Assignee. But such a Feoffee may rebut, and so may any Ten't that claims under the Warranty, whether he come to the Land by Right or Wrong. But he that claims above the Warranty shall not rebut, as if two Brethren be infeoff'd with Warranty to the Elder and his Heirs, who dies without Issue, the Younger, tho' he be Heir to him, shall neither vouch nor rebut, for he claims not under his Brother but by the Survivor.

Donee with Warranty to him, his Heirs, and Assigns, makes a Feoffment, and dies without Issue, the Warranty is extinct, because the Estate to which it was annex'd is spent. But if he had made such a Feoffment before the Statute of *Donis*, the Warranty had remain'd, for then both the Donee and his Feoffee had a Fee-Simple; but since the Statute, an Estate *T.* is look'd upon as a particular Estate, and the Donor who was adjudg'd to have but a Possibility of Reverter has now a Rev'n.

Warranty enlarges not an Estate, as if Lessor release to Lessee *L.* and warrant the Land to him and his Heirs.

Assignee by Parol, *before 29 Car. 2. 3.* should vouch as Assignee.

B. is infeoff'd with Warranty to him and his Heirs, and Assigns, and infeoffs *A.* who reinfeoffs *B.* *B.* or his Assigns shall never vouch, for *B.* can't be his own Assignee.

386.

Warranty never goes with Burgh *Eng.* or Gavelkind Land to the special Heir, nor can it descend to one of the half Blood, and neither collateral Warranty, nor lineal with Affets, did ever bind the Heir, &c. unless it descended on him.

If two make a Feoffment with Warranty, and one die, the Survivor shall not be vouch'd alone, but the Heir of him that is dead also; but if a joint Obligation be made by two, and one die, the Action shall be brought against the Survivor only.

387.

If there were two Brothers by diverse Venters, and the elder had releas'd with Warranty to the Uncle's Dis'sor (*before 4 & 5 Annæ 16.*) and died without Issue, the Uncle was barr'd; but if he had died without Issue, the younger Brother might enter as Heir to the Uncle, for the Warranty shall not barr him, because he is not Heir to him that made it.

388.

Ten't *T.* makes a Lease *L.* Rem'r in Fee, a collateral Ancestor confirms the Estate of Lessee, and binds himself and his Heirs to Warranty for Term of Lessee's Life, this barr'd the Entail for Term of Life of Lessee only. For a Warranty may descend to one's Heirs for Term of another's Life only, as Land or Annuity may be granted to one and his Heirs, for the Life of *J. S.* which is no Inheritance, but only a Freehold descendible. But a Lease *T.* or other Chattel, tho' it be granted to one, and his Heirs, shall go to his Executors.

The

The Defeating of the Estate to which the Warranty is annex'd, defeats the Warranty also; as if the Discontinuee of Ten't *T.* were disseis'd, and a collateral Ancestor had releas'd with Warranty to the Dis'sor, this barr'd the Issue, but if the Discontinuee had enter'd on the Dis'sor, the Bar was remov'd. So if such a Release were made to the Discontinuee's Feoffee on Condition, and the Discontinuee after had enter'd for a Breach, the Issue might recover.

Warranty may be a Bar to the Heir tho' it descend to him before the Right. And if a Lease *L.* were made to *A.* Rem'r to his next Heir, and *A.* had been disseis'd, and had releas'd with Warranty, the Heir was barr'd before 4 & 5 Anne 16. tho' the Warranty fell, and the Rem'r came in *Esse* at the same Time.

But a Warranty shall never bar a Right which commences after it is made, therefore if *A.* make a Feoffment with Warranty, and then purchase the Seignory, and the Feoffee *cesse*, the Warranty shall not bar *A.* of his Writ of *Cessavit*. Nor shall Warranty ever bar an Estate in Possession, Rev'n, or Rem'r, that is not devested, displac'd, or turn'd to a Right before, or at the Time when the Warranty was made. Therefore, if the Father be Ten't of Land, and his Son have a Rent or Common out of it, and the Father make a Feoffment with Warranty, this never barr'd the Son of the Rent. And tho' the Son be disseis'd after the Warranty, and then the Warranty descend, yet he is not bound by it, because he was in Possession when

when it was made. So if an Ancestor had releas'd to my Ten't *L.* in Possession with Warranty, this never barr'd my Rev'n or Rem'r. And if a Woman Grantee of a Rent had married the Ten't, and a Stranger had releas'd to the Ten't with Warranty, he never could have Benefit thereof *as to the Rent, for the Wife's Estate therein was not displac'd when the Warranty was made, and if the Wife or her Heir afterward bring an Action for the Rent, it must be grounded on some Act done after the Warranty was made.*

§ 89.

But if Ten't *T.* of Rent disseise the Ten't of the Land, and make a Feoffment with Warranty; or if Ten't of the Land marry the Grantee of Rent, and make a Feoffment with Warranty; in both these Cases the Feoffee shall vouch as of Land discharg'd of the Rent, for the Warranty extends to all Things issuing out of the Land, and secures it in such Plight, as it was in the Feoffor at the Time of the Feoffment made; but inasmuch as the Rent is a Thing that lies not in Discontinuance, the Issue or Wife may distrain for it, and avoid the Warranty, for it is in their Election whether they will look on themselves as in Possession or not.

Co. L. 366.
b.

Warranty shall not bar meer Titles, as by Force of a Condition, assent to a Ravisher, Exchange, &c. nor Title of Dower, for these remain in their original Essence, and can't be displac'd; yet it seems that tho' a Woman can't be barr'd of Dower by a Warranty, yet the Ten't in Writ of Dower may vouch the Feoffor, &c.

In

In Actions which Lessee *T.* may have, a Warranty can't be pleaded in bar; but in those Actions when the Freehold or Inheritance come in Question, the Warranty may be pleaded. *And Damages may be recovered by Force of a Warranty, if a Lease T. only be evicted from him to whom it was made.* Ho. 4.

Ten't *T.* infeoffs his Uncle, the Uncle makes a Feoffment with Warranty, and takes back a State in Fee, and makes a 2d Feoffment without Warranty, and dies, the Issue is not bar'd, for the Warranty was extinct by his taking back a State in Fee; but if he had only taken a State *T.* or *L.* it had only been suspended during the particular Estate, but in the first Case it is extinct, because no Man can warrant Land to himself.

A Man can never vouch as Assignee to himself, and regularly a Man can't vouch himself as Assignee of another. But if Feoffee with Warranty to him and his Heirs, infeoff his eldest Son with Warranty, and die, it is said that the eldest Son shall vouch himself, and his younger Brother being Heir of Burgh *Eng.* Land, because the Warranty betwixt him and the Father is determined by Act of Law, and it seems likewise that in that Case he may (a) vouch the Father's Feoffor. If a Feoffee with Warranty to himself, his Heirs, and Assigns, reinfeoff the Feoffor and a Stranger, or the Feoffor and his Wife, the Warranty remains; for tho' the Fee-Simple of the Warranty and of the Estate warranted meet in the same

390.

Vid. supra,
262.
a) Co. L.
384.

same Person, yet another is jointly seisd with him, who would be prejudiced if the Warranty should be extinct; or if two make a Feoffment with Warranty to the Feoffee, his Heirs, and Assigns, and the Feoffee reinfeoff one of them, the Warranty remains, for the other Feoffor may still warrant the Lands to him that was his Companion, as well as to the first Feoffee

A Man infeoffs a Woman with Warranty, they marry and are impleaded, he makes Default, she being received shall vouch the Husband, tho' the Warranty were then in Suspence. A Woman infeoffs a Man with Warranty, they marry and are impleaded, he shall vouch himself and her.

Infant *in Ventre sa mere* may be vouch'd if God give him Birth, if not, such a one Heir, but the Infant can't be vouch'd alone, for Process shall be presently awarded.

Ten't T. makes a Feoffment with Warranty, and disseises the Feoffee, and dies seisd, leaving Assets, it is said that this suspended Warranty and Assets prevent the Remitter, and so every one's Right shall be sav'd.

If after the Release with Warranty, the Person that made it be attainted, or gain a Release of all Covenants, Demands, or Warranties, the Issue is not barr'd, because the Warranty descends not to him.

Vid. *supra*,
122.

The Forfeiture on an Indictment of Felony, shall relate to the Day on which it was committed, but on an Appeal to the Judgment only.

The

The Defendant waging Battle in an Appeal of Death, was slain, and Judgment was given that he should be hanged, that the Lord might have his Writ of Escheat, *quia suspensus per Collum, &c.* And in (a) (a) Contra, *Ha. P. C.* 16.
 Five some have been attainted after their Death by Presentment, &c. A Man is said to be convict by Verdict, Confession, or Recreancy, but he is not attainted before Judgment. A Felon convict forfeits his Goods and Chattels, &c. but his Lands are not forfeited, nor is his Blood corrupted before Attainder.

391.

If the Party arraign'd for Felony stand Mute, he shall be adjudg'd to *pain Fort & Dure*, but shall not be attainted; but if one arraign'd for High Treason stand mute, he shall have such Judgment as if he were convict by Verdict.

Felony *ex vi Termini significat quodlibet crimen Felleo animo Perpetratum*; Felonice can be express'd by no other Word; anciently Pardon of all Felonies extended to High Treason, but the Law is otherwise now; but all Petty Treasons, Murders, &c. are pardoned thereby; a Man forfeits all his Lands in Fee, and goods and Chattels for such Felonies, for which he shall have Judgment to be hang'd, but he shall forfeit his Goods and Chattels only for Felony by Chance-Medley, *se Defendendo*, or Petit Larceny.

Piracy, tho' it be Felony, was only punishable by Civil Law, before 28 H. 8. 15. and an Attainder thereof by Course of the Civil Law does not corrupt the Blood, but an

an Attainder by Force of that Statute does
A Pardon of all Felonies does not discharge
Piracy, because it was a Félonny where
the Common Law took no Conufance, and
the said Statute did not alter the Offence
but only ordained a new Way of Tryal
and a new punishment.

Attainder of Heresy or *Præmunire* cor-
rupt not the Blood, yet *Præmunire* forfeits
Lands in Fee-Simple, but Heresy does not
where a Statute prohibits a Crime, *sub For-
feiture de corpore & de avoier*, or *sub foris
factura omnium, que in potestate suâ obtinet*
or under Pain of being at K.'s Will, Body
Lands, and Goods, this extends not to Loss
of Life or Member, but if the Words are
subeat iudicium Vitæ & Membrorum, such
Judgment shall be given as in Case of Felon-
ny, and the Blood shall be corrupted.

How far the Issue of one attainted shall
inherit, *Vide supra*, 12.

If Ten't *T.* be attainted for Felony he for-
feits the Land for his own Life only, but if
he be attainted for Treason he forfeits the
whole Inheritance by 33 *H.* 8. 20. If the
Issue in *T.* be attainted, and then the Fa-
ther die, he can't enter tho' he be pardoned
because his Blood is corrupted.

392. A Seigniorship is granted with Warranty
the Tenancy escheats, the Warranty is ex-
tinguished, because the Seigniorship to which it was
annex'd is determined.

393. There can be but one Recompence in
Value on the Warranty, but there may be
several Recoveries in Value, in respect of
diverse Estates, as if a Dis's or infeof's Hus-
band

and and Wife for *L.* and the Heirs of the Husband who aliens in Fee with Warranty, the Alienee shall recover in Value both *in cui in vitâ* by the Wife, and in Entry *sur* Dis'in by Dis'ee. So if one seis'd of Rent release to Ter-tenant and warrant the Land to him, and his Heirs, he shall recover in Value both as to the Rent, and Land, but for one and the same Estate he shall recover in Value but once.

If lineal Warranty and Affets descend to the Issue, and he alien the Affets and die, his Issue shall not be barr'd; but if he had brought a *Formedon* and been barr'd by the Warranty and Affets, his Issue shall be barr'd, tho' the Affets be alien'd afterwards, for a *Formedon* is a Writ of the highest kind Ten't *T.* can have.

FINIS.

T H E INDEX

Abatement. See *Pleading.*

Abator, 102.

Abbot. See *Corporation.*

Abettors. See *Appeal.*

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vity to distrein, (417) And this the Law gave to the
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Common.

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A Condition may defeat, enlarge, or create an Estate, (285) It may either defeat the whole, or part of the Estate, (305, 307, 330) in the whole, or part of the Land, 287.

Conditions are either in Deed or in Law, (285) A Condition in Deed is created either by an express Clause that the Party may re-enter, (285, 289) or that the Estate shall cease, or be void, (304, 484) if such a Thing happen; or by the Words *Sub Conditione ita quod*, or *Proviso* that the Party do so or so without more immediately following the granting Clause, (288, 294) or by the Words, that a Lessee Y. shall do so or so, on Pain of Forfeiture, (290, 302) Or by *Pro* in the Grant of a Thing executory, or by *Causa Matrimonii*
pralocuti

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actually charging the Estate done or suffer'd by him the Feoffor may re-enter, notwithstanding such Disability be afterwards removed, (311) But if a Feoffor be disabled by Attainder, or otherwise to perform a Condition on his Part, and at the Day the Disability be remov'd, he may perform it, (311, 312)

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It is safest to appoint a certain Day and Place when and where a Condition shall be performed, (299) If no Day be limited, a Mortgagor has Time during Life to pay the Money, (295) also an Obligor may at any Time perform a Condition requiring his sole Labour, and can't be hasten'd by Request, (297) One bound by a Condition in a Bond or Feoffment, to make a Feoffment to the Feoffor, (295) or to the Feoffor and a Stranger (309) or that one Stranger shall infeoff another, shall save it by a Performance at any Time, if he be not hasten'd by Request, (295, 296, 299) But an Obligor bound by Condition to do a transitory Act, or such a local Act as may be done in the others Absence, (295) or Executors to whom Land is devised to be sold, (32,) must at their Peril do it presently. One bound to grant an Annuity, payable yearly at *Easter*, must grant it before the next *Easter* (296, 297) An Obligor or Feoffee, on Condition to infeoff a Stranger, must do it presently at their Peril, and also give him Notice (295, 309) If one be bound to pay Money at a certain Place any Time during his Life, he may pay it whenever he finds the Party there, otherwise he must give Notice when he will pay it (298) If *A.* be bound to *B.* that *C.* shall infeoff *D.* on such a Day, *C.* must give Notice to *D.* thereof, and request

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request him to be ready on the Day, (298) If no Place be limited, an Obligor and Mortgagor must seek the Obligee and Mortgagee, if in *England*, and pay the Money; (294, 297) Also a Feoffee, &c. bound by a Condition to pay a Rent to a Stranger, which is in Truth but a Sum in Gross, must at his Peril seek him, &c. (300) But a Man is not bound to tender Rent any where but upon the Land, 298.

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G.

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or

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